Supreme Court, U.S.
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IN THE SUPREME COURT OF
OF THE UNITED STATES
OCTOBER TERM, 1994

NO:_____

PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER,

vs.

DARRYL STEVEN GOSS,

RESPONDENT.

ON CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI

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STATEMENT OF THE QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG JURISDICTIONS IN THE NATION AS TO WHETHER THE PROSECUTION MAY USE RES JUDICATA OR COLLATERAL ESTOPPEL AFFIRMATIVELY TO BAR A CRIMINAL DEFENDANT FROM RELITIGATING HIS OR HER RESPONSIBILITY FOR THE UNDERLYING FELONY IN A FELONY MURDER WHERE THE DEFENDANT WAS CONVICTED OF THE UNDERLYING FELONY AT THE PREVIOUS TRIAL, AND THAT CONVICTION WAS AFFIRMED ON APPEAL?

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IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM 1994

PEOPLE OF THE STATE OF MICHIGAN

Petitioner,

vs.

DARRYL STEVEN GOSS,

Respondent.

ON CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by and through JOHN D. O'HAIR, Prosecuting Attorney, County of Wayne, TIMOTHY A. BAUGHMAN, Chief of Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above cause on August 29, 1994.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is appended as Appendix A. The opinion of the Michigan Court of Appeals is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 7, 1993. The order of the Michigan Supreme Court was entered on August 29, 1994. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The right to jury trial of the Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Defendant was convicted after a jury trial of First Degree Felony Murder, MCL 750.316; MSA 28.548; Robbery Armed, MCL 750.529; MSA 28.797; two counts of Assault with Intent to commit Murder, MCL 750.83; MSA 28.728; Kidnapping, MCL 750.349; MSA 28.581 and two counts of First Degree Criminal Sexual Conduct, MCL 750.520b(1); MSA 28.788(2)(1).

Defendant appealed his conviction to the Michigan Court of Appeals, raising five issues. In a per curiam opinion dated March 3, 1989, the Court affirmed the convictions.

Defendant Goss made a letter request to the Michigan Supreme Court, asking for

review of his conviction. On or about October 31, 1989, the Court ordered the Recorder's Court to determine whether defendant was indigent, and if so, to appoint an attorney to file an application for leave to appeal on defendant's behalf. On or about July 18, 1990, the Michigan Supreme Court granted leave, limited to the issue of whether the trial court's instructions as to aiding and abetting a felony murder was reversibly erroneous.

In an order dated June 17, 1991, the Michigan Supreme Court reversed defendant's conviction of felony murder and remanded the case for a new trial on that charge. The Court determined the final instructions of the trial court omitted the intent requirement for aiding and abetting. Justices Boyle and Riley dissented, stating the question needed to be settled by the Court.

Michael Reynolds, the assistant prosecutor assigned to retry the case, filed a Motion in Limine in front of Judge Crockett. Mr. Reynolds argued the Supreme Court reversed only the felony murder conviction because of an instructional error by Judge Townsend as to the requisite intent for an aider and abettor to a felony murder. Mr. Reynolds noted the underlying crime was armed robbery and that defendant had challenged, in his appeal of right to the Court of Appeals, the sufficiency of the evidence. That Court, Mr. Reynolds noted, rejected defendant's claim as to insufficient evidence. Mr. Reynolds also noted that the Michigan Supreme Court, in issuing its order reversing the felony murder conviction, affirmed the judgment of the Court of Appeals in all other regards. (MT,5-6).

Mr. Reynolds further argued that the jury in the felony murder retrial should be instructed that the element of armed robbery necessary for the jury to convict of felony murder das already been proven (and was affirmed by Michigan's highest court) and thus, was not an issue for them to decide. (MT,6). Mr. Reynolds noted that in Michigan a defendant has a right to a trial by jury on every essential element of a crime and argued that such an instruction would not violate that right where defendant has had his right to a jury trial on that issue and has no further right to review on that issue. Mr. Reynolds pointed out that defendant had already been convicted of robbery armed by a jury and the conviction was affirmed despite a challenge to the sufficiency of the evidence. Mr. Reynolds argued that under the doctrines of res judicata, collateral

estoppel, and the law of the case, and the retrial, defendant had had that element proven already and the jury should be so advised. (MT,6).

The court asked about the charges and asked if the armed robbery was a separate count from the felony murder charge. Ms. Palmieri answered in the affirmative. Mr. Reynolds added that he thought robbery armed was count sixteen and felony murder count one. The court asked if defendant was charged with two separate crimes arising out of the same conduct as they relate to a homicide and a robbery, the latter being a part of both charges. Mr. Reynolds replied in the affirmative. Mr. Reynolds noted the offenses were different but not separate, then agreed with the court and stated they were separate counts and carried separate penalties, but were interrelated

to each other by temporal proximity and by the language contained in the Information. (MT,12-13).

The court recognized defendant was not properly convicted in Count One of felony murder because of instructional error and was convicted of the underlying robbery armed in count Sixteen. The court opined the prosecution could not say that since defendant was convicted in Count Sixteen of armed robbery, it was relieved of proving the armed robbery alleged in count one, which would lead to establishing only whether or not someone was killed and whether or not defendant or any other person accused had the appropriate intent to warrant a conviction for first degree felony murder, and not have to prove the underlying robbery. The court opined that would deny defendant his due process rights. (MT,14-15).

The court stated that felony murder, a creature of the legislature, makes certain conduct resulting in the death of a human being a statutory crime called first degree murder. One of the crimes giving rise to a charge of first degree murder is where there is murder committed in the commission of an armed robbery. The court noted first degree felony murder and armed robbery are, by law, separate offenses. The court recognized defendant was convicted of armed robbery, but that evidence had to be adduced as to each count in the Information. The court held that just because defendant was convicted in Count Sixteen does not mean that the felony does not have to be proven in Count One because the legislature has said that everything that comprises this statutory offense has to be proven to a trier of fact beyond a reasonable doubt. The court held

defendant would be denied his right to due process if the court instructed the jury the armed robbery element had been proven. (MT,16-17).

In a decision issued on June 7, 1993, the Court of Appeals affirmed the decision of the lower court, holding that even though the requirements of collateral estoppel were met, defendant's constitutional right to trial by jury entitled him at retrial to have the new jury decide the facts and determine his guilt or innocence regarding all the elements of felony murder. The Court held collateral estoppel must yield to this fundamental constitutional right, even if proving the armed robbery element may be considered a waste of valuable judicial resources and even if the trial court can instruct the jury to not consider his conviction for armed robbery

as evidence that he had the requisite intent for felony murder. Judge Griffen dissented. He was of the opinion that the doctrine of res judicata barred retrial from a prior adjudication. (Appendix B)

Petitioner filed an application for leave to appeal in the Michigan Supreme Court on June 28, 1993. On August 29, 1994, the Michigan Supreme Court affirmed the decision of the Court of Appeals, concluding that the doctrines of res judicata and collateral estoppel cannot be invoked to preclude a defendant in a criminal case from contesting an essential element of a charge.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the issue presented is an unsettled one of significance to the nation, regarding the jury trial and due process consequences of applying res judicata to recognize that the defendant has been convicted (and the conviction affirmed by the highest state court) of the armed robbery offense, the underlying offense in a felony murder charge, which was overturned because of an instructional error on the felony murder charge. In United States v Colacurcio, 514 F 2d 1 (CA 9, 1975), the defendant was convicted of income tax evasion and appealed. He claimed as error an instruction regarding payments received from a Seattle businessman. The Ninth Circuit court fully discussed the doctrine of

collateral estoppel as part of the doctrine of res judicata in criminal cases. The Court stated the doctrine succinctly as "where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action." Colacurcio, 514 F 2d at 5-6.

The Court held that relitigation of the issue was precluded by collateral estoppel. The Court cited United States v Rangel-Perez, 179 F Supp 619, 625 (SD Cal, 1969) in support of the principle that collateral estoppel is applicable against a criminal defendant:

> "The wise public policy underlying the doctrine [to put an end to the litigation of a given subject matter, once the parties have had a full hearing and fair adjudi- cation of the issue], and common-sense

> judicial administration as well, combine to advocate application of collateral estoppel against a defendant in a criminal case, at least as to certain issues, where such issues have been in fact litigated and necessarily adjudicated in a prior criminal case between the identical prosecutor and the identical accused. Issues as to status, for example, would seem most appropriate for application of the doctrine. . . ."

Colacurcio, 514 F2d at 6.

The Colacurcio Court saw the crucial question to be whether the facts upon which the Government relies were in fact decided and essential to the judgment in the prior case. The Court determined the following requirements need be met: (1) the issue must be the same as that involved in the prior action; (2) in the prior action, the issue must have been raised and litigated, and actually adjudged; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the

determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Colacurcio, 514 F 2d at 6.

The Court went on to determine the doctrine was inapplicable to Mr. Colacurcio where the amounts of the payments were not significant in the prior action, rather only the appellant's involvement in receiving protection money was necessary to establish his participation in the conspiracy. The court reversed the conviction, in part, because the issue was not "'distinctly put in issue and directly determined.'" Colacurcio, 514 F 2d at 6.

In Hernandez-Uribe v United States, 515 F2d 20, 21 (CA 8, 1975), the defendant claimed he was deprived of the presumption of innocence, his Sixth

Amendment right to a jury trial and his right to confront witnesses because the following instruction was given at his trial for unlawfully reentering the country:

> "There has been a judicial determination in litigation, to which the defendant was a party, that on June 6, 1967 defendant was an alien and not a citizen of the United States. The defendant is bound by that determination. Evidence of his status as citizen or alien prior to June 6, 1967 is therefore immaterial and you will not consider it."

The court held the trial court properly applied collateral estoppel to the defendant and properly instructed the jury. The court stated:

> "The Supreme Court recognized the use of collateral estoppel in criminal cases in Ashe v Swenson, 397 US 436, 444, 90 S Ct 1189, 1194, 25 L Ed 2d 469 (1970) where it said:
>
> The federal decisions have made clear that the rule of collateral estoppel in criminal

> cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. See Hoag v New Jersey, 356 US 464, 470-471, 78 S Ct 829, 2 L Ed 2d 913 (1958)."

Hernande-Uribe, 515 F 2d at 22.

In United States v Pelullo, 14 F 3d 881 (CA 3, 1994), the defendant was convicted of forty nine counts of wire fraud and one count of racketeering under the federal Racketeer Influenced and Corrupt Organization Act. On appeal, all convictions but one of the wire fraud counts were reversed. After retrial, defendant was convicted of the remaining forty eight counts. At retrial, the jury was instructed that "as a matter of law, the defendant has committed the wire fraud offense described in Racketeering Act 60. That means you don't have to consider whether the government has proved this offense." Pelullo, 14 F 3d

at 887. The wire fraud was the predicate offense, or an element of the RICO charge. Pelullo held held that precluding defendant from contesting an element of the charge with an instruction violated his Sixth Amendment right to a trial by jury. The court adopted the reasoning of the New Jersey Supreme Court in State v Ingenito, 87 NJ 204, 216-217; 432 A2d 912 (1981), and held:

> "The right to a jury trial applies in every and all criminal prosecutions. We hold that such a right to a jury trial necessitates that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial discretion attending collateral estoppel. . . . As the New Jersey Supreme Court articulated, applying collateral estoppel against the defendant in a criminal case interferes with the power of the jury to determine every element of the crime, impinging upon the accused's right to a jury trial. Such an supplication is invalid."

Pelullo, 14 F 3d at 896.

Professor Allen D. Vestal, the leading scholar regarding res judicata and collateral estoppel firmly believes these doctrines can be applied in criminal cases in situations such as this in the present case. Justice Ruth Bader Ginsburg has stated Professor Vestal is "the giant in the field" of the doctrine of prior adjudication. Ginsburg, The Work of Professor Allan Delker Vestal, 70 Iowa L R 13,14 (1984).

Professor Vestal has stated that the doctrine of res judicata has been applied for over three hundred fifty years. Vestal, Rationale of Preclusion, 9:29 St. Louis Univ L J 29, 30 (1964). In Preclusion/Res Judicata, 19 Vanderbilt L R 683 (1966), Professor Vestal and John C. Coughenour discussed situations in which preclusion is claimed by the government. The authors believed the

preclusion doctrine can reasonably be applied to a criminal defendant by the state. Id., at 698-699.

In Issue Preclusion and Criminal Prosecutions, 65 Iowa L R 281, 284, Professor Vestal stated:

> "When the state asserts issue preclusion against a criminal defendant, a discussion of double jeopardy or due process is inappropriate. Rather, the source of the state's claim of issue preclusion must be the power of the courts to control judicial administration-that is, the courts' power to administer justice. Admittedly, this has always been the ground for res judicata/preclusion in civil cases; courts are now beginning to recognize the logic of its application in criminal cases as well." (Emphasis in original, footnote omitted).

Professor Vestal believes issue preclusion can be used offensively by the defendant or the state, id., at 289-290, 297, as well as claim preclusion, id., at 312-314.

As to claimed constitutional violations, Professor Vestal stated:

> "Although the Supreme Court has not yet ruled on the issue, many of the courts who have considered the issue have reached the conclusion that there is no constitutional infirmity in the use of issue preclusion because the defendant was afforded the opportunity to exercise constitutional rights at the first trial".

Id., at 314.

While the legal precedents present a conflict in the country, the authority of legal scholars suggests that the doctrines of res judicata and collateral estoppel should have application to the accused in the criminal arena. Petitioner's position succinctly put is that these doctrines naturally should apply to both civil and criminal cases. The "fears" of applying res judicata to criminal cases in light of the

protections afforded an accused are unfounded in both logic and reason, especially where, as in this case, a criminal conviction has survived the appellate process. Moreover, Due Process applies to both the civil and criminal arenas, these arenas being more similar than dissimilar when proper application of these doctrines is studied.

The rights of the accused that the Court of Appeals opinion suggests will be denied have been protected at every stage of the proceedings, from arrest, through prosecution, to conviction, and in this case to appeal. Petitioner has been afforded an attorney to protect his rights; the prosecutor, whose function is to see that justice has been done, tried the case within the confines of the rules; the various trial-level courts insured fair treatment of Respondent and

adherence to the rules of law and procedure (acknowledging Respondent was given discovery, his right to be presumed innocent, confront witnesses and testify in his own behalf). A violation of these rights does not occur by application of res judicata, but rather an acknowledgment that the rights have been adhered to in the prior proceeding is made, avoiding duplication and the possible embarrassment of inconsistent verdicts.

Professor Vestal spoke to the offensive use of preclusion against a defendant and its affect on his constitutional rights:

> "The defendant has not been deprived of his or her constitutional rights; the defendant is being denied the opportunity to present the identical issue to the courts a second time after he or she has lost on the issue or after a plea of guilty has been entered.

> Certainly there is no right to use the time of the courts in repetitive litigation of the issues.

Vestal, Issue Preclusion in Criminal Prosecutions, 65 Iowa L R 281, 321 (1980).

The doctrine of res judicata (preclusion of relitigation in the same cause of action of an issue, both factually and legally, which has already been litigated) is a sound doctrine which acknowledges one bite at the apple per legal issue addressed by a litigant. The doctrine is not limited to the civil arena and there is no logical or legal reason behind such a limitation. There is no sound reason, logically or legally to have the state relitigate the armed robbery in this case; likewise, the Respondent is not prejudiced or denied any constitutional rights by application

of res judicata here. The case should go to trial with the jurors informed that the defendant is responsible on the predicate felony, leaving the remaining elements of felony-murder for their consideration.

RELIEF

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

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Dated: November 12, 1994
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OPINION

APPENDIX A

FILED: August 29, 1994

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs. No. 97021

DARRYL S. GOSS

Defendant-Appellee

BEFORE THE ENTIRE BENCH

AFTER REMAND

LEVIN, J.

Darryl Steven Goss was convicted of armed robbery[1] and first-degree felony murder.[2] This Court affirmed the armed

[1] MCL 750.529; MSA 28.797.

[2] MCL 750.316; MSA 28.548.

robbery conviction[3] but reversed the felony-murder conviction on the ground that the instructions to the jury omitted the intent requirement for aiding and abetting, and remanded the case to the Detroit Recorder's Court for a new trial on the felony-murdercharge.[4]

The question presented is whether Goss is barred by the doctrines of res judicata and collateral estoppel from relitigating the issue whether he committed the armed robbery at a retrial for first-degree felony murder. We hold that he is not so barred, and that he may do so.

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[3] This Court also affirmed Goss' convictions of two counts of assault with intent to commit murder (MCL 750.83; MSA 28.278), kidnapping (MCL 750.349; MSA 28.581), and two counts of first-degree criminal sexual conduct (MCL 750.520b(1); MSA 28.788(2)(1).

[4] 437 Mich 1021 (1991).

I.

Before the new trial, the prosecutor moved for an order in limine barring relitigation of the underlying charge of armed robbery, and seeking an instruction of the jury that Goss had been found guilty of armed robbery and that the jury's responsibility was only to determine whether he was also guilty of aiding and abetting the murder that occurred during the commission of the armed robbery.[5]

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[5]The prosecutor argued at the hearing on the motion for an order in limine that under the doctrines of res judicata and collateral estoppel the judge should instruct the jury that the element of armed robbery has "already [been] proven." The prosecutor explained that once the jury was "advised that that element has been proven," the jurors "would focus simply on the remaining issue, which would be whether or not the Defendant aided or assisted in the commission of a murder during that armed robbery for which he already stands convicted."

Following denial of the motion, the prosecutor was granted leave to appeal. The Court of Appeals affirmed, stating that it was persuaded that Goss' "constitutional right to a trial by jury overrides the affirmative use of collateral estoppel to establish facts pertaining to an essential element of an offense in a subsequent criminal prosecution. . . "[6] The Court said: that, although all the elements of collateral estoppel were present, Goss' right to trial by jury entitled him "at retrial to have the new jury decide the facts and determine his guilt or innocence regarding all the elements of

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[6] 200 Mich App 9, 20; 503 NW2d 682 (1993). One judge dissented. The Court of Appeals discussed this Court's decision in People v Gates, 434 Mich 146, 154; 452 NW2d 627 (1990), in which this Court held that the people were not precluded from prosecuting the defendant for second-degree sexual criminal conduct although there had been a jury finding of no jurisdiction in probate court child protection proceedings.

felony murder.[7]

The Court of Appeals adopted the reasoning of the Supreme Court of New Jersey in State v Ingenito, 87 NJ 204, 216-217; 432 A2d 912 (1981), and quoted the following statement of that court:

> [C]ollateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations. Hence, the collateral estoppel doctrine, which serves to establish virtually conclusive evidence of a critical element of criminal guilty, cripples the jury in the discharge of its essential responsibilities contrary to the constitutional guarantees of the jury right in a criminal trial.

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[7] Id. at p 21.

The Court "explicitly reject[ed] the use of a balancing test under the rubric of due process in making this determination."[8]

The dissenting Court of Appeals judge relied on People v Ford, 65 Cal 2d 41; 52 Cal Rptr 228; 416 P2d 132 (1966),

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[8]The Court referenced the decision of the new Hampshire Supreme Court in State v Johnson, 134 NH 498, 503; 594 A2d 1288 (1991), and the decision of the New York Court of Appeals in State v Plevy, 52 NY2d 58, 64-66; 436 NYS2d 224; 417 NE2d 518 (1980), and said:

> It is inappropriate to determine the applicability of collateral estoppel case by case in terms of a balancing test weighing competing policy considerations because more is at stake than just a defendant's right to due process requiring the state to prove, beyond a reasonable doubt, every element of the charge against him. Accordingly, in the clash between the principle of collateral estoppel and the constitutional right to trial by jury, collateral estopel must give way to permit a defendant's unfettered exercise of the constitutional right to trial by jury. [200 Mich App 20.]

in which the California Supreme Court held that it was not error at a retrial for first-degree felony murder, following reversal because of instructional error, to instruct the jury that the defendant had been convicted of robbery and other offenses.

II.

Goss was tried in March, 1987, on charges of first-degree felony murder, assault with intent to commit murder, first-degree criminal sexual conduct, kidnapping, and armed robbery.

The prosecutor's evidence tended to show that Goss, John Markopoulos, Nelson, Angelica Markopoulos, and Jerry Aikens drove from the Detroit home of Ronald Sherman to the Redford home of Ronald Bonadeo to commit a robbery. When the

four arrived at Bonadeo's house, Goss began to work under the hood of the car, and Nelson entered the house. Nelson encountered Kristine Zambosco who was baby-sitting Bonadeo's young child. Nelson asked Zambosco where Bonadeo kept his gun, and he then forced Zambosco upstairs and sexually assaulted her.

As Nelson was sexually assaulting Zambosco, Goss saw Bonadeo and two of his employees, Michael and Jeffrey Goers, arrive at the house in Michael Goers' truck. The three men entered the house.

Upon entering the house, Bonadeo noticed that some of his possession were out of place, and he did not see Zambosco. Bonadeo told the Goers brothers that they should all leave the house immediately.

Bonadeo testified that as they sought to leave Goss blocked the doorway. The prosecutor claimed that Goss had become concerned that the three men would interfere with the robbery, and followed them into the house. Goss held a knife in his hand and ordered the men to lie, face down, on the ground. Goss then ordered the men to give him their wallets and jewelry, and they complied.

Goss next called for "Jack," Nelson's nickname. Nelson came down the stairs and assumed control of the three men. Goss left the house. Nelson then shot the three men in the head. Michael Goers died, and Jeffrey Goers suffered serious head injury and the loss of an eye. Bonadeo suffered only minor injury.

After the shooting, Goss, Nelson, Aikens, and Markopoulos left in Bonadeo's

pickup truck with Goss driving. They forced Zambosco to accompany them back to Sherman's home in Detroit. When they arrived at Sherman's home, according to Zambosco, Goss sexually assaulted her.

The police arrested Goss at Sherman's house during the night the crimes were committed. They found Goss hiding under a basement stairwell near the wallets that had been stolen from Bonadeo and the Goers brothers.

Goss gave a different account. He testified that he was running a quick errand for his mother when he encountered his neighbor, Sherman. Sherman asked if Goss would accompany Markopoulos and Nelson to pick up a check in Redford. Goss had performed some mechanical work on Markopoulos' automobile earlier in the week, and Sherman asked Goss to accompany

Nelson and Markopoulos because the two were worried that the automobile might break down. Goss agreed to accompany Nelson and Markopoulos to Redford, and, as the three were leaving, Aikens joined them.

Goss testified that the automobile had not been running smoothly during the ride to Redford. When they arrived at Bonadeo's Redford home, Goss began to work under the hood of the automobile. According to Goss, Nelson and Aikens entered the house, and, after awhile, Aikens returned and asked Goss to pop the trunk of the automobile.

Goss testified that Bonadeo and the Goers brothers arrived while he, Aikens, and Markopoulos were outside in the vicinity of the automobile. He said that Aikens, not he, followed the three men

into the house. Later, Aikens left the house, gave Goss the keys to Bonadeo's truck, and forced Zambosco into the truck. Aikens returned to the front door of the house. As Goss, Zambosco, and Markopoulos were waiting in the truck, they heard three gunshots. Nelson and Aikens then rejoined the three in the truck, and Goss drove the truck back to Sherman's house.

Goss denied knowing that Nelson, Aikens, and Markopoulos planned to commit a robbery at the Bonadeo's house. He insisted that he did not enter the Bonadeo house, and he denied sexually assaulting Zambosco.

Goss' lawyer argued that the witnesses had misidentified Goss. He observed that, although Bonadeo claimed to be certain that Goss had forced him to

the ground and robbed him, the clothes worn by Goss when he was arrested did not match the clothes that Bonadeo described his attacker as wearing.[9] Similarly, the lawyer argued that Zambosco's description of the clothes worn by the man who attacked her did not match the clothes worn by Goss.[10] Goss' lawyer also highlighted Zambosco's statement that "the only two people she saw in the house were Mr. Aikens and Mr. Nelson," and he noted that Goss' fingerprints were not found on any of the property taken from the house.

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[9]The lawyer stressed in his closing argument that Bonadeo described the man who forced him to the ground as wearing all dark clothes. The lawyer said that Goss was wearing a pair of "light green pants or medium green pants" on the night of the robbery.

[10]Zambosco described her attacker as wearing a black jacket, Levis jeans, and tennis shoes. When Goss was arrested he was wearing green corduroys and work shoes.

The jury found Goss guilty of felony murder, armed robbery, two counts of criminal sexual conduct in the first degree, and kidnapping. He was sentenced to nonparolable life in prison for felony-murder and concurrent forty-to eighty-year terms for the other convictions.

III.

The rights of a person accused of a felony to trial by jury and to due process of law include the right to determination by; the jury whether the prosecution has proven beyond a reasonable doubt every element of the charge.[11] The judge may not direct a verdict either in whole[12] or in

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[11]The United States Supreme Court said:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. [In re Winship, 397 US 358, 364; 90 SCt 1068; 25 L Ed2d 368 (1970).]

[12]The United States Supreme Court recently said that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." Sullivan v Louisiana, 508 US___,113 SCt 2078; 124 LEd2d 182, 188 (1993).

part.[13] The prosecutor insists that these commands would not be violated by applying the doctrines of res judicata or collateral estoppel against Goss because a jury has already found beyond a reasonable doubt that Goss committed an armed robbery.

Whenever a defendant is charged with different crimes that have identical

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[13]The United States Court of appeals for the Eleventh Circuit said:

> The rule is firmly established that the trial judge cannot direct a verdict in favor of the government for all or even one element of a crime. The former Fifth Circuit emphatically stated this principle:
>
> "[N]o fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truth. In our federal system, the Trial Court may never direct a verdict either in whole or in part." [United States v Goetz, 746 F2d 705, 708 (CA 11, 1984)].

elements, the jury must make an independent evaluation of each element of each charge. A jury in a criminal case may reach different conclusions concerning an identical element of two different offense. People v Lewis, 415 Mich 443; 330 NW2d 16 (1982).

The defendants in Lewis were charged with committing a felony and with possession of a firearm during the commission of a felony. Although the jury was required to find beyond a reasonable doubt that the defendants had committed a felony before it could convict them of felony-firearm, the jury acquitted the defendants of the underlying felonies, but convicted them of felony-firearm. This Court affirmed the defendants' convictions although the jury's verdicts were inconsistent. We explained that a jury may reach inconsistent verdicts as a result of

mistake, compromise, or leniency.[14] We also ruled that a trial judge should not instruct the jury that it must acquit on a felony-firearm charge if it acquits on

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[14]The Court built on its earlier decision in People v Vaughn, 409 Mich 463, 466; 295 NW2d 354 (1980), where the Court held that a jury could return inconsistent verdicts on charges of assault with a dangerous weapon and felony-firearm. The Court said:

> Juries are not held to any rules of logic nor are they required to explain their decision. The ability to convict or acquit another individual is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and a conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility.

the underlying charge.[15]

The United States Supreme Court similarly rejected a defendant's argument that because the jury had acquitted him of the predicate offenses this worked an estoppel precluding his conviction of the compound offense, an element of which was in the commission of the predicate

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[15]The Court said:

> The judge may and should instruct the jury that a person cannot be convicted of felony-firearm unless the jury finds that "he comit[ted] or attempt[ted] to commit a felony." Because conviction of a felony or of an attempt to commit a felony is not an element of the offense, the jury may not be instructed that it must convict of an underlying felony in order to convict of felony-firearm. [People v Lewis, supra, p 455.]

felonies.[16]

[16]In United States v Powell, 469 US 57, 68; 105 SCt 471; 83 LEd2d 461 (1984), the Court held that a defendant who was acquitted of the predicate felonies of conspiracy to possess cocaine and possession of cocaine was not entitled to reversal of her conviction of the compound offense of facilitating commission of narcotics offenses by telephone. Before the jury could find that the defendant facilitated the commission of narcotics offenses by telephone, it would have to find that the defendant committed one of the predicate offenses. The jury had acquitted on those predicate offenses.

The Court rejected the defendant's argument that the jury's verdict on the predicate offenses worked an estoppel vis-a-vis the compound offense. The Court said:

> [R]espondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented a an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper-the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily-and erroneously-argue that since the jury convicted on

We conclude that when an accused is charge with an offense that has as an element commission of a predicate offense the jury's consideration of the charged predicate offense and its consideration of that offense again in the context of a compound offense are separate and distinct. The jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense.

The jury in Goss' first trial, thus, could have found that the prosecutor did not establish Goss' guilt of the armed

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([16] continued)

> the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel-which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict-are no longer useful.

robbery element of the felony-murder charge and at the same time have found Goss guilty of armed robbery.

Because the first jury's verdict on the armed-robbery charge would not have precluded the jury from considering afresh the armed-robbery element of the felony-murder charge, the first jury's verdict on the armed-robbery charge does not estop Goss from relitigation, or preclude the second jury from considering afresh, the armed-robbery element of the felony-murder charge. Estopping Goss from contesting the armed robbery charge would prevent the second jury from making its own independent evaluation of the armed-robbery element of felony murder, and, therefore, would be the equivalent of partially directing a verdict against him.

IV.

Our conclusion that the doctrines of res judicata and collateral estoppel cannot be invoked ot preclude a defendant in a criminal case from contesting an essential element of a charge finds support not only in the decision of the New Jersey Supreme Court in State v Ingenito, relied on by the Court of Appeals, but also in a recent decision of the United States Court of Appeals for the Third Circuit, United States v Pelullo, 14 F3d 881 (CA 3, 1994).

In Ingenito, supra, pp 215-217, the New Jersey Supreme Court held that estopping a defendant from challenging an essential element of a charge would infringe on his right to trial by jury and violate his right to be presumed

innocent.[17]

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[17]Ingenito was charged with possession of a firearm by a convicted felon. He had previously been convicted of unlicensed transfer of weapons on the basis of conduct that arose out of the same transaction as the felon in possession charge. Instead of moving to estop Ingenito from litigating the possession issue, the prosecution moved to admit evidence of Ingenito's conviction for illegal transfer of the weapons. Ingenito argued that if this evidence were to be admitted, as a practical matter, it would work an estoppel on the possession issue. The New Jersey Supreme Court agreed, and its analysis proceeded on the assumption that admission of this evidence would operate as a collateral estoppel.

The court said:[18]

> The application of collateral estoppel against a defendant constitutes an invasion of the fact-finding and ultimate decisional functions of the jury. If an essential element of a case is presented as concluded or settled, effectively withholding from the jury crucial underlying facts, the jury's capacity to discharge fully its paramount deliberative and decisional responsibilities is irretrievably compromised. It follows in such circumstances that the defendant's jury right will have been, commensurately, abridge. [Ingenito, supra, p 213].

In Pelullo, the United States Court of Appeals for the Third Circuit adopted the Ingenito analysis and held that the doctrines of res judicata and collateral estoppel do not bar a defendant in a criminal case from contesting an essential element of the charge. The defendant had been convicted of forty-nine counts of wire fraud and one

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[18]See also text accompanying n 8.

count of racketeering under the federal Racketeer Influenced and Corrupt Organization Act.[19]

The defendant's convictions on all the counts except one of the wire fraud counts had been reversed. On remand, the defendant was retried on forty-eight counts of wire fraud and one count of RICO, and was convicted on all the counts.

The jury on remand was instructed that, "as a matter of law, the defendant has committed the wire fraud offense described in Racketeering Act 60 [the one count affirmed by the Third Circuit]. That means you don't have to consider whether the government has proved this offense." Pelullo, supra, p 887. Wire

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[19] 18 USC 1962.

fraud was the predicate offense, an element of the RICO charge, just as armed robbery is the predicate offense and an element of the felony-murder charge against Goss.

The court in Pelullo held that precluding a defendant from contesting an essential element of a charge in this manner violated the defendant's Sixth Amendment right to trial by jury. The court explained that "one acceptable method of interpreting the Sixth Amendment right to a jury trial is to examine the historical practice of the United States and England at the time the bill of rights was ratified." The court attached significance to the government's inability to "point to any case on or before 1791 in which collateral estoppel was applied against an accused in a criminal case." Id. p 893.

The court explained that its holding, grounded in the Sixth Amendment:

> [c]omports with and is supported by the uniformly accepted notion that in criminal cases there is no mechanism available to the government comparable to making a motion for directed verdict or summary judgment in civil case. Indeed, no matter how strong and even overwhelming the evidence is, and although a judge can grant a judgment of acquittal in favor of the defendant before or even after the jury renders it verdict, see Fed. R. Crim. p 29, a criminal defendant in federal courts can be convicted only by the verdict of the jury. [Id., p 895.]

The court summed up its holding:

> The right to a jury trial applies in every and all criminal prosecutions. We hold that such a right to a jury trial necessitates that every jury empaneled for a prosecution considers evidence of guilt afresh and without the judicial direction attending collateral estoppel. . . . As the New Jersey Supreme Court articulated, applying collateral estoppel against the defendant in a criminal case interferes with the power of the jury to determine every element of the crime, impinging upon the accused's right to a jury trial.

> Such an application is constitutionally invalid. [Id. p 896.[20]]

While the United States Supreme Court has not squarely addressed the question whether a criminal defendant may be estopped from contesting an essential element of a charged offense, there is reason to believe that the Court would not allow this use of collateral

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[20]The Florida Court of Appeals reached a similar conclusion, albeit in dicta, in State v Stiefel, 256 So 2d 581, 585 (Fla App, 1972). The court explained that while a defendant could invoke collateral estoppel against the prosecution, the reverse would not be permitted. The Court stated:

> The doctrine [collateral estoppel] cannot apply, however, when as here the issue has been resolved against the accused [in a prior proceeding]. This is so because if it were to be given any effect at all in such case the trial court in the subsequent prosecution could charge the jury, or consider as a matter of law, that such issue

estoppel.[21] In Simpson v Florida, 403 US 384, 386; 91 SCt 1801; 29 LEd2d 549 (1971), the Court held that where a defendant had been acquitted of robbing one person on the ground that the prosecution failed to produce sufficient identity evidence, the defendant could assert collateral estoppel in a trial for

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([20] continued)had been resolved as a true fact to the detriment of the accused. This would be impermissible, of course, under due process considerations which assure an accused a jury trial on all issues relating to each element of a given criminal charge. Id. (Emphasis in original.)]

[21]As the excerpt from United States v Powell, n 16 supra, illustrates, the Supreme Court has not permitted a criminal defendant to assert collateral estoppel against the government where the jury acquits on a predicate offense and convicts on a compound offense of which the predicate offense is an element. If the Court will not allow a defendant to estop the jury from considering anew an element of one offense when it has not found that identical element in the context of another offense, it seems unlikely that the Court would allow the government to estop the jury from considering anew an element of one offense when it has found that element in the context of another offense.

the robbery of a second person claimed to have occurred during the same transaction as the first robbery. The court observed:

> And, had the second trial never occurred [i.e., had the prosecutor obtained a conviction for the robbery of the first person and then proceeded to try the defendant for the robbery of the second person that arose out of the same transaction], the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night. [(Emphasis added.)]

More recently, in United States v Dixon, 509 US___ n 15; 113 SCt 2849; 125 L Ed2d 556, 577, n 15 (1993).[22] Justice Scalia, writing for four

[22]In Dixon, the defendant had been released on bond on conditions that he not commit any criminal offense and that, if he committed a criminal offense, he would be subject to prosecution for contempt of court. While out on bond, the defendant committed a narcotics offense, and the judge that had granted the defendant bond found him in contempt of court.

justices, observed that "under Ashe v Swenson, 397 US 436; 90 S Ct 1189; 25 LEd2d 469 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to a second one-though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time." (Emphasis added)

While the New Hampshire Supreme Court in State v Johnson, 134 NH 498, 500-502, 594 A2d 1288 (1991), did not completely bar the application of collateral estoppel against a criminal defendant, it recognized the dangers of applying issue preclusion against a criminal defendant. The court noted "the inherent difficulty involved in

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([22]continued)The defendant was then charged with the narcotics violation as a separate offense. He claimed that a trial on the narcotics charge violated the double jeopardy provision of the Fifth Amendment. The Court held that prosecution on the narcotics offense was not barred.

applying a tool which originated in the civil law to the criminal setting." Id., p 501. It held that a court must balance the state's interest in precluding a defendant from litigating an essential element of a charge against the defendant's interests in the having a jury consider all the elements of a charge.

The New Hampshire balancing test, it should be noted, seems clearly to accord more weight to defendant's interests than to the state's interests in involving estoppel. The court aligned itself with the '[m]any courts" that have "found that policy considerations generally weight in the defendant's favor."[23] Id., p 503.

[23]In Johnson, the court held that the state could not preclude the defendant from contesting an essential element of the charge of operating a motor vehicle after his license had been revoked. The defendant testified that he had not operated the vehicle. The

(23continued) judge instructed the jury that to convict the defendant, it had to find that he operated the vehicle. The jury convicted the defendant, and the prosecutor charged the defendant with perjury. Before the perjury trial, the prosecutor asked the judge to instruct the jury that the prior conviction conclusively establishes that the defendant operated the vehicle . The trial court refused the request, and, on interlocutory appeal, the New Hampshire Supreme Court affirmed.

V.

The prosecutor relies on federal cases in which the defendant was charged with illegally entering the country. The courts held that the defendants were estopped from contesting their alienage where that issue had previously been decided adversely to them.[24]

In the alienage cases, the conduct that led to the second or subsequent prosecution occurred after the judicial determination that was held to have barred relitigation. In the instant case, as in Ingenito, Pelullo, and Johnson, the conduct preceded the

[24]E.g., United States v Rangel-Perez, 179 F Supp 619, 6215 (SD Cal, 1959), Pena-Cabanillas v United States, 394 F2d 785, 786 (CA 9, 1968), United States v Bejar-Matrecios, 618 F2d 81 (CA 9, 1980), and Hernandez-Uribe v United States, 515 F2d 20, 21 (CA 8, 1975).

judicial determination sought to be raised as a bar.

Federal courts invoked collateral estoppel in the alienage cases to deter reentry into this country. In United States v Rangel-Operez, 179 F Supp 619, 626 (SD Cal, 1959), the court said:

> If the issue of alienage were to be tried each time a defend ant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present. Even though the present risk of prosecution for illegal entry would remain under 8 U.S.C.A. 1326, a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict. The Government would be estopped by any unfavorable verdict, and accomplishment of the objectives of the immigration laws to

> discourage and effectively control the already difficult problem of illegal entries into this country would thus be weakened. The Government should not be put to the expense and burden of proving the issue of alienage after one judicial determination has been made, each time an alien decides to reenter this country illegally.

In the instant case, in contrast, there is no danger that the failure to apply estoppel against Goss would result in great expense. Goss is not charged with the type of recurring violation that was at issue in the alienage cases. Thus, the principal rationale of the alienage cases does not apply in the instant case.[25]

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[25]Courts have declined to read the alienage cases as authority for applying collateral estoppel against a criminal defendant where there is no risk of costly repeated trials. See, e.g., State v Johnson, n 8 supra, pp 500-502; State v Ingenito, supra, p 218, n 7; Gutierrez v Superior Court, 24 Cal App 4th 153, 163; 29 Cal rptr 2d 376, 386-387 (1994).

The United States Court of appeals for the Third Circuit in Pellullo, surpa pp 892-893, criticized the alienage cases as lacking constitutional or historical analyses of the application of collateral estoppel against criminal defendant, and said:

> We do not accept the position of the Court of Appeals for the Ninth Circuit that "wise public policy and common sense judicial administration,". . . are good and sufficient reasons to apply collateral estoppel against the defendant, thereby taking away a fact issue from the jury in a subsequent criminal case. . . The Court of Appeals for the Ninth Circuit's application of this civil case rationale in criminal cases presumably rests on the major premise that public policy and judicial efficiency have the same weight and value in criminal cases as in civil cases. Such an implicit premise does not hold.

The court noted that the United States Supreme Court has consistently held that a defendant's interest in vindicating himself in a criminal case, an "interest

of transcendent value," prevails over the policy considerations,[26] and the court concluded that "the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings." Id., p 893. We agree with the Third Circuit's view that "[t]he language of the Sixth Amendment does not admit any indication that the absolute right to a jury trial in criminal cases can be modified by reasons of efficiency or public policy argument." Id., p 895.

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[26]The court observed that an accused's interest in vindicating himself in a criminal trial has been held to transcend "the President of the United States' general claim of absolute presidential privilege. . . a state's important interest in preserving the anonymity of juvenile offenders. . .; and a patient's privacy interest in the confidentiality of medical records and the societal interest in encouraging the free flow of information between patient and psychotherapist. . . Id., p 893.

VI.

The prosecutor relies heavily on People v Ford, supra. On facts similar to those in the instant case, the California Supreme Court held that, on retrial for felony murder, it was permissible to instruct the jury that the defendant had been convicted of robbery, kidnapping, and possession of a concealed weapon.

The California Court of Appeals recently distinguished Ford from cases like the instant one in Gutierrez v Superior Court, 24 Cal App 4th 153, 166-168; 29 Cal Rptr 2d 376, 386-387 (1994). In Gutierrez, the defendant was convicted of attempted murder for his role in a shooting. The victim of the shooting later died, and the prosecutor charged Gutierrez with murder. The

prosecutor moved to estop Gutierrez from contesting the issues of identity and intent on the ground that those issues had been conclusively decided against him in his first trial.

The court said that Ford was not controlling because, in Ford, the application of collateral estoppel did not prevent the defendant from presenting his diminished capacity defense to the felony-murder charge. Gutierrez, however, would have been precluded from presenting his main defense-mistaken identity-if he had been estopped from contesting the identity issue. Here, as in Gutierrez, and in contrast with Ford, the application of collateral estoppel would prevent Goss from presenting his primary defense to the charges.

The court in Gutierrez noted that

the defendant in Ford did not raise a constitutional claim. The court said that Ford therefore does not stand for the proposition that applying collateral estoppel against a defendant is constitutionally permissible.[27] The court added that '[i]t must also be remembered that Ford was decided before Ashe and Simpson questioned the ability of the prosecution to invoke collateral estoppel against a criminal defendant." 24 Cal App 4th 168.

[27]Gutierrez cited the dissenting opinion in the Court of Appeals in the instant case and indicated that the reliance there on People v Ford, was misplaced.

VII.

The prosecutor stated that the motion in limine for an order estopping Goss from contesting the armed-robbery element seeks to protect the victims of the crime from being required to again testify about the armed robbery.

Estopping Goss from contesting the armed-robbery charge would not spare the victims of these crimes appreciable additional inconvenience or discomfort. The prosecutor's felony-murder case against Goss is closely intertwined with, and indeed inseparable from, Goss' asserted involvement in the armed robbery. The prosecutor's felony-murder theory is that Goss forced Bonadeo and the Goers brothers to lie down on the floor at knife-point and then summoned Nelson so that Nelson could kill them.

Bonadeo is essentially the only witness who can testify about these events. Thus, it is inescapable that Bonadeo will be required to testify concerning the trauma of being held down at knife-point and s hot in the head. Having Bonadeo give additional testimony concerning the theft of his wallet and jewelry while Goss had him on the ground would not appreciably increase the strain on Bonadeo when he testifies at a retrial.

If Goss were to be precluded from contesting the armed-robbery element of the felony-murder charge, he would be effectively precluded from presenting his primary defense of mistaken identify. In Ashe v Swenson, supra, pp 464-465. Chief Justice Burger observed:[28]

[28]The Chief Justice wrote in dissent in Ashe v Swenson, but his observations, nevertheless, are pertinent to the issue here presented.

> Very properly, in criminal cases, finality and conservation of private, public, and judicial resources are lesser values thanin civil litigation. Also, courts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil case, i.e., here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial. (Emphasis in original).

The prosecutor's theory of felony murder, once again, is that Goss forced Bonadeo and the Goers brothers to lie down on the ground and then summoned Nelson to kill them. Goss does not deny that someone forced the three men to the ground and held them there until Nelson arrived. Goss argues rather that the witnesses who identified him as the assailant are mistaken.

Affirmed and remanded to the Recorder's Court.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs. No. 97021

DARRYL S. GOSS,

Defendant-Appellee

BEFORE THE ENTIRE BENCH

BRICKLEY, J. (concurring).

I agree with the majority that this Court should decline the prosecutor's invitation to allow the application of collateral estoppel or res judicata in a criminal case to conclusively establish an essential element as a matter of law in the retrial of the felony-murder conviction by instructing the jury to accept the valid conviction of armed robbery obtained in the first trial as the underlying felony.

I write separately because I do not agree with the majority's conclusion that the constitutional right to an impartial jury, US Const, Am VI,[1] would be violated by the use of a valid armed- robbery conviction to establish an element in a subsequent prosecution for felony murder.

I do, however, believe the application of collateral estoppel or res judicata in the retrial of this case would impermissibly disable the presumption of innocence an accused is entitled to in accordance with due process guaranteed under the federal and

[1]See the dissenting opinion, p 10 for the text of United States Constitution.

state constitutions.[2] Invocation of the principles of collateral estoppel or res judicata as a bar to relitigation is inappropriate when applied against a criminal defendant to essential element of a crime arising out of the same transaction. A criminal defendant's due process right to a fair trial, in which there is a presumption of innocence and the requirement that state to prove every element of the charge beyond a reasonable doubt, outweigh any interest in judicial economy and efficiency asserted by this prosecutor.

I.

The defendant was convicted by a jury of first-degree felony murder,[3]

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[2]US Const, AM XIV, and Const 1963, Art 1 sec., 17.

[3]MCL 750.316; MSA 28.548

assault with intent to commit murder, first-degree criminal sexual conduct, kidnapping, and armed robbery. This Court reversed the first-degree felony murder conviction by order, declaring error in the jury instruction regarding the omission of intent required for aiding and abetting. A retrial was ordered on the felony murder charge. All other convictions were affirmed.

During a pretrial motion hearing, the prosecution made the following request to the trial judge:

> "(M)y motion is essentially that the jury in Mr. Goss' felony murder trial should be instructed that the element of armed robbery necessary for the jury to convict him of felony murder has already been proven and that it's not an issue for them to decide...the defendant has had that element already proven, and that the jury in this trial should be advised that that element has been proven. And then they would focus simply on the remaining

> issue, which would be whether or not the Defendant aided or assisted in the commission of a murder during that armed robbery for which he already stands convicted.
>
> * * *
>
> So in this regard I think that we have met our burden already of proving that particular element. Defendant doe not have a right to have two juries make that same decision.

II.

Res judicata has been applied in the civil context to bar relitigation of an issue adjudicated in the same cause of action. Jones v Chambers, 353 Mich 674, 680-681; 91 NW2d 889 (1958). Collateral estoppel bars relitigation of factual determinations reached in a different cause of action. Id.

Where asserted against the government by criminal defendants, the

Fifth Amendment double jeopardy claim,[4] has been viewed as the constitutional embodiment of the doctrine of collateral estoppel. Ashe v Swenson, 397 US 436; 90 SCt 1189; 25 LEd2d 469 (1970). Where it can be determined from a prior decision to acquit that an issue of ultimate fact has been resolved in favor of the defendant, that prosecution is foreclosed by the constitutional bar of double jeopardy from entertaining as subsequent prosecution that would relitage that issue of ultimate fact. Id., p 445-447.

In contrast, this case presents the offensive use of the results of prior adjudication against the criminal defendant. Interestingly, aspects of both the doctrine of res judicata and collateral estoppel are presented.

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[4]Applicable to the states through the Fourteenth Amendment. Benton v Maryland, 395 US 784; 89 SCt 2056 23 Led2d 707 (1969).

Obviously armed robbery is a different cause of action than felony murder. As the majority opinion aptly explores, the jury determination that the defendant is guilty of armed robbery as charged under count sixteen, even though logically equivalent to a finding of guilt on the first element of felony murder, is not the equivalent, given the capacity for inconsistency allowed to a jury in rendering its assessment of guilt. See pp 10-13. Thus, there is no res judicata of the felony element of the felony-murder charge absent the fact that it can be inferred from the guilty verdict that the predicate felony was deemed to have been committed. What the prosecutor is arguing in his request that the jury verdict regarding count sixteen be applied as conclusive evidence of the predicate felony is a request for collateral estoppel.

The distinction between the two doctrines, as noted in the dissenting opinion, is not dispositive of this case because there is no legal basis for allowing the use of one type of preclusion and not the other. See slip op, p 1, n 1. The distinction, however, does illustrate the potential for the doctrine of res judicata to turn a retrial into a meaningless procedural exercise in which the result is all but dictated to the jury if everything properly decided by the first jury is recycled for mandatory use by the second jury. If we were to accept the prosecutor's request, res judicata, taken to its extreme, could be invoked under these facts to transfer all elements of felony murder established by reference to the guilty verdict obtained in the he firs trial. Every one of the elements of felony murder that were necessarily found

for the prosecution at the conclusion of the first trial would have to be accepted by the jury. Only the omitted intent determination would be left for the jury at the conclusion of the retrial.

III.

The felony murder statute under which the defendant was committed, MCL 750.316; MSA 28.548[5] calls for the factfinder to

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[5]MCL 750.316; MSA 28.548 provides in pertinent part:

> Murder which is perpetrated by means of poison, lying in wait or other wilful, deliberate and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life.

CJI 2d 16.4 suggests the following instruction be given to the jury where first-degree felony murder is charged:

(1) The defendant is charged with first-degree felony murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

determine whether a felony was committed, not whether the defendant has been convicted. The majority today overextends the Sixth Amendment right to an impartial jury when it holds that that right encompasses the right to an independent jury determination of each essential element of the crime. Slip op, p 12.

([5] continued)

> (2) First, that the defendant caused the death of (name deceased), that is that (name deceased) died as a result of (state alleged act causing death).
>
> (3) Second, that the defendant had one of these three states of mind: he/she intended to kill, or he/she intended to do great bodily harm to (name deceased), or he/she knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his/her actions.
>
> (4) Third, that when he/she did the act that caused the death of (name deceased), the defendant was committing (or attempting to commit/or helping someone else

I agree with the understanding expressed in the dissenting opinion on this issue to the extent that the Sixth Amendment right to an impartial jury functions to provide a check on the power of the government over the individual.

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[5] (Continued)

commit the crime of (state felony). For the crime of (state felony), the prosecutor must prove each of the following elements beyond a reasonable doubt: (state elements of felony).

(5) Fourth, that the killing was not justified, excused, or done under circumstances that reduce it to a lesser crime)

(Use 6 or 7 where factually appropriate:

(6) To establish an attempt the prosecutor must prove beyond a reasonable doubt that the defendant intended to commit the crime of (state felony) and that he/she took some action toward committing that crime, but failed to complete it. It is not enough to prove that the defendant made preparations for committing the crime. Things like planning the crime or arranging how it will be

The right insures the accused has the option of having the ultimate determination of his innocence or guilt rendered by peers rather than officials. Duncan v Louisiana, 391 US 145, 155; 88 SCt 1444; 20 LEd2d 491 (1968).

The rights afforded by the Sixth Amendment also guarantee an impartial jury. Impartiality addresses the state of the jury before the trial begins. The right includes the procedures in place to call jurors and name them to a panel for a given trial. The system of selection should not allow jurors who are biased or predisposed. Witherspoon v Illinois, 391 US 510; 88 SCt 1770; 20 LEd2d 776 (1968). The constitutional issues surrounding

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5 (Continued)
committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation to the point where the crime would have been completed if it hadn't been

the requirement of an impartial jury center on insuring that the process by which the jury is drawn contemplates a fair representation of the community. Jeb v Alabama ex rel TB, 511 US____,____ n 19; 114 SCt 1419; 128 LEd2d 89, 105, 105, n 19 (1994).

The defendant in this case was able to select a jury trial in the first prosecution and will be able to on retrial. He participated in voir dire and registered no complaint that the manner in which the jury was impanelled did not contemplate a representation of the members of the community. There were no complaints that any juror demonstrated

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([5]continued) interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime of (state felony) and not some other objective.

bias or predisposition and was allowed to remain. Where a conviction has been validly obtained in a prior trial under these circumstances, its use does not render the jury impartial under the Sixth Amendment, nor does it deprive the defendant of a Sixth Amendment right to a jury decision regarding the remainder of the case An impartial jury did determine that the defendant committed an armed robbery. Similarly, an impartial jury will determine whether or not the defendant committed felony murder

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([5]continued)

> (7) The defendant must have been either committing or helping someone else commit the crime of (state felony). To help means to perform acts or give encouragement, before or during the commission of the crime, that aids or assists in its commission. At the time of giving aid or encouragement, the defendant must have intended the commission of the (state felony).

regardless of whether the prosecution is granted the preclusive use of the first jury's finding with respect to the armed robbery.

As noted by the dissent, the prohibition against a directed verdict is a prohibition against the judge refusing to allow any jury to decide the elements. Slip op, p 15. Here a jury has been allowed to pronounce the defendant guilty of armed robbery.[6] The prosecutor's argument is for the recognition of that finding in the retrial as distinguished

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[6]In responding to the view that collateral estoppel applied against a criminal defendant constitutes a violation of the Sixth Amendment right to jury, and the analogy to the prohibition against granting a directed verdict to the prosecution, it has been observed that "a critical distinction...is that, when collateral estoppel is applied, the defendant has already had a jury hear, examine and sift the testimony of the witnesses during the prior trial. The truth of a particular fact has been established." State v Ingenito, 87 NJ 204, 226; 432 A2d 912 (1981) (Schreiber, J., concurring).

from a governmental agent's intervention in the fact finding.

IV.

Having concluded that the defendant is not deprived of his Sixth Amendment right to an impartial jury by the application of res judicata or collateral estoppel, I now turn to discuss the inherent prejudice to the defendant's right to a fair trial that is unavoidable in the use of these doctrines against a criminal defendant in a situation in which more than one charge of criminal activity arises form the same nucleus of facts.

While framed in a right to jury analysis, the New Jersey Supreme Court found the preclusive use of a prior conviction to establish an element of a

crime in a subsequent prosecution under facts similar to those presently considered to induce the jury "to think in terms of guilt, instead of presumed innocence, before its deliberations have begun." State v Ingenito, 87 NJ 204, 216; 432 A2d 912 (1981).

"(T)he presumption of innocence...is... the most universal and strongest presumption known to law...." People v Licavoli, 264 Mich 643, 655; 250 NW 520 (1933). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v Williams, 425 US 501, 503; 96 SCt 1691; 48 Led2d 126 (1976). It is axiomatic that in any criminal case a defendant is presumed innocent until proven; guilty. People v Kayne, 286 Mich 571, 576; 282 NW 248 (1938). The importance of the presumption

of innocence has been characterized as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" In re Winship, 397 US 358, 363; 90 SCt 1068; 25 Led2d 368 (1970) (quoting Coffin v United States, 156 US 432, 453; 15 SCt 394; 39 LEd 481 (1895).

An error that infringes upon the presumption of innocence deprives the criminal defendant of a fair trial and is therefore a due process violation. Taylor v Kentucky, 436 US 478, 479; 98 SCt 1930; 56 LEd2d 468 (1978).

While the presumption of innocence regarding the crime of armed robbery no longer exists after a valid conviction has been obtained, see People v Rowell, 14 Mich App 190, 196; 165 NW2d 432

(1968), the presumption continues to exist regarding the reversed felony-murder charge because it was not validly obtained Allowing knowledge of the fact of the first jury's finding of guilt with regard to armed robbery would unfairly prejudice the second jury's ability to presume the defendant innocent of felony murder. It is not reasonable to expect a jury to presume innocence with respect to the remaining elements, despite cautionary instructions, in the face of being told another jury determined the defendant had in fact committed the armed robbery.

In Sandstrom v Montana, 442 US 510; 99 SCt 2450; 61 LEd2d 39 (1979), the Supreme Court ruled that a jury instruction interfered with the presumption of innocence because it could have been interpreted to conclusively

establish an essential element and was therefore a violation of the criminal defendant's due process rights.[7]

In State v Johnson, 134 NH 498; 594 A2d 1288 (1991), the defendant was charged in a first trial with the unlawful operation of a motor vehicle after his license had been revoked. The defendant testified that he let a friend use his car on the day in question. A police officer testified that he knew the defendant and recognized him. The car was abandoned after a chase and the driver had fled. The jury found the defendant guilty, and the defendant was subsequently charged with perjury on the basis of his testimony at trial.

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[7]This Court adopted Sandstrom's due process analysis in reference to our state constitution equivalent of the federal Due Process Clause, Const 1963 art 1, 17. People v Wright 408 Mich 1, 22; 289 NW2d 1 (1980).

Similar to the case presently before this Court, the prosecutor in Johnson moved that the doctrine of collateral estoppel be applied to the effect that the jury would be instructed that the conviction of operating the motor vehicle was conclusive proof of the truth element of the perjury crime-that the defendant, and not a friend, was operating the vehicle.

As is the case under Michigan law, the New Hampshire Supreme Court observed that it has never allowed the application of collateral estoppel to affirmatively establish an essential fact against a defendant in a criminal prosecution. Id.,

p 501.[8] The court concluded that the defendant's due process right to have a jury determine every element of the crime charged outweighed the state's argument for judicial economy. Id., p 504

[8]Much of the foreign authority relied on by the prosecutor rand the dissent in the case presently before; this Court is distinguishable in that it addresses situations in which the issue precluded is a determination of the "status" of the defendant, such as alien citizenship or paternity. See United States v Bejar-Matrecios, 618 F2d 81 (CA 9, 1980); Hernandez-Uribe v United States, 515 F2d 20 (CA 8, 1975); Pena-Cabanillas v United States, 394 F2s 785 (CA 9, 1968); United States v Rangel-Perez, 179 F Supp 619 (SD Cal, 1959); People v Mojado, 22 Cal App 2d 323; 70 P2d 1015 (1937); Commonwealth v Ellis, 160 Mass 165; 35 NW 773 (1893); State v Braskett, 10 Ohio Op 2d 497, 499; 162 NE2d 922 (1959).

In Carmody v Seventh Judicial Dist Court, 81 Nev 83; 398 P2d 706 (1965), the defendant brought a res judicata or double jeopardy claim, arguing that in entering a guilty plea for assault, the subsequent prosecution for murder after the victim died was barred. Any statements contained in that opinion about the use of the plea as res judicata against the defendant was dicta, as is the case in United States v Colacurcio, 514 F2d 1, 6 (CA 9, 1975) (see dissenting op, p 7, n 13). State v Sargood, 80 Vt 412; 68 A r51 (1907), involved an evidentiary ruling regazrding the admissibility of a prior motive and purpose in a subsequent prosecution for attempting to

([8]continued)poison two people. Id. This case is also distinguishable in that the conclusive use of the prior conviction to prove the defendant did poison animals at one time as evidence of motive and purpose was not used to conclusively establish any essential element of the prosecution for attempting to poison people.

The early Massachusetts case of Commonwealth v Evans, 101 Mass 25 (1869) closely parallels the prosecutor's request considered by this court today. In Evans, the defendant was tried and convicted of assault. When the victim died, charges of manslaughter were brought. In the second trial, the judge instructed the jury that the prior assault conviction was conclusive evidence that the defendant's use of the knife was unjustifiable. While collateral estoppel was not applied to establish any essential elements of the charge, it was applied to bar relitigation of the self-defense theory argued by the defendant in the first trial. The broadly sweeping language used by the court is devoid of constitutional analysis, but suggests it would have upheld the prosecutor's request in this case:

> "Upon general principles, the parties being the same, the former judgement must be held to have established all facts which were involved in the issue then tried, and essential to the judgment rendered upon it." (Id., p 27)

My research of contemporary Massachusetts law did not uncover any criminal cases with similar facts in which the doctrine of collateral estoppel was invoked to bar relitigation of essential elements by a

(8continued) defendant. It is clear that a party to a civil action may invoke collateral estoppel to preclude further litigation regarding issues decided by a criminal conviction. Aetna Casualty & Surety Co v Niziolek, 395 Mass 737; 481 NE2d 1356 (1985). It has also been held in Commonwealth v 707 Main Corp, 371 Mass 374; 357 e2d 753 (1976), that a determination in a civil lawsuit that a film was not obscene did not bar the relitigation of whether the film was obscene in the criminal prosecution for dissemination of obscene matter. People v Ford, 65 Cal 2d 41; 52 Cal Rptr 228; 416 P2d 132 (1966), is the only recent authority on point that has allowed collateral estoppel in a subsequent prosecution arising out of the same transaction. Given its subsequent history, addressed by the majority opinion, slip op, pp 22-23, it is of questionable viability. Like Evans, supra, Ford was decided before Ashe v Swenson supra and Simpson v Florida, 403 US 384; 91 SCt 1801; 29 LEd2d 549 (1971) (because mutuality is not present in the collateral estoppel provided for by the Fifth and Fourteenth Amendments, the prosecution cannot rely on a reversed conviction as a basis for collateral estoppel to counter the defendant's assertion that the government may not bring a third charge after the first conviction was reversed and an acquittal was obtained in the second trial). Neither Ford nor Evans address the constitutional issues raised today.

Similarly, the early English cases cited by the dissent, King v Matthews, 5 Price 202 (1797), and Attorney General v Wakefield, 5 Price 202, 203 (1797), were not followed by the English court in Attorney General v King, 5 Price 195, 202, n 2; 146 Eng Rep 579, 582 n 2 (Ex Div 1817). "Neither Matthews nor Wakefield appears to have been noticed by any

The court concluded that the defendant's due process right to have a jury determine every element of the crime charged outweighed the state's argument for judicial economy. Id., p 504.

Similarly, the prosecution in this case asserts vague arguments for judicial economy and efficiency that do not outweigh the potential for eroding the presumption of innocence on the remaining elements inherent in establishing one element of a crime where both the prior conviction and the subsequent prosecution arise from the same nucleus

(8continued) other English court. It is commonly recognized that until 1974, there was still no direct English authority regarding the question whether issue estoppel applies in criminal proceedings."

of facts.[9]

Knowledge of a prior conviction of the underlying felony, coupled with an instruction that the conviction conclusively establishes that the defendant committed that act, will almost inevitably taint the jury's view of whether the defendant committed the remaining acts necessary for conviction of felony murder. The jury determination of guilt on all elements of a crime

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([8] continued) United States v Pelullo 14 F3d 881, 894, n 6 (1994). The 1974 case allowing collateral estoppel to be applied against a criminal defendant, R v Hogan, 59 Crim Appl 174, 183 (1973) 2 All Er 142, 155 (Crown Ct) was overruled; by the House of Lords. Director of Public Prosecutions v Humphrys, 62 Crim Appl (1975)

[9]The dissenting opinion maintains that because the prosecution must prove malice upon retrial (the instruction the first jury did not receive),m the jury would not be precluded from hearing evidence of the underlying facts of the felony. Slip op, p 18, If, as I suspect, the underlying facts of the felony must be explored to establush the necessary malice, where is the judicial economy?

cannot be seen as a mechanistic, formulaic calculation. Each element is not determined independent of the other necessary factual determinations, nor should they be. The whole may not equal the sum of the parts. The collective, deliberative determination of one factlikely influences the consideration and resolution of others. The presence or absence of one element of a crime may change the way a jury approaches a case. The risk is simply too high that the jury will not presume innocence once it is informed of the determination of guilt of the armed robbery.

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs. No. 97021

DARRYL GOSS

Defendant-Appellee

BEFORE THE ENTIRE BENCH

RILEY, J. (dissenting).

In this case, we must decide whether the doctrine of res judicata or collateral estoppel (preclusion)[1] bar defendant from relitigating, and relieves the prosecution from reproving, the felony of armed robbery at his retrial for first-degree felony murder where defendant's conviction for armed robbery

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[1]Whether the instant case properly implicates the doctrine of res judicata or collateral estoppel is not dispositive in this case. Indeed, there is no question that the elements of either would be satisfied on the instant facts.

was affirmed on appeal. Because I believe res judicata or collateral estoppel bars relitigation of the armed robbery conviction, I dissent from the lead and concurring opinions. Moreover, I am persuaded that defendant was afforded his constitutional rights during his armed robbery trial and, despite the use of this conviction on retrial, will again be afforded all his constitutional rights.

I.

Before reaching the merits of this question, it is necessary to distinguish between merely using a prior conviction as evidence to prove an element of a crime and using a conviction as conclusive proof of one element of a crime as presented in this case. In the

former, the Michigan Rules of Evidence[2] would raise the initial barrier to entry, with possible constitutional infringements raising secondary concerns. On the other hand, the latter requires an analysis of whether collateral estoppel or res judicata is appropriate in a criminal case, as well as whether applying it against a defendant is constitutionally permissible. In this case, we are only presented with the latter, and, accordingly, I limit my discussion to these questions.

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[2]MRE 803(22) provides:

> Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crimepunishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(2 continued)
Further, assuming these requirements are met, a court then would likely consider MRE 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, these questions are not before this Court, and, accordingly, I do not address them. See also Vestal, Issue preclusion and criminal prosecution, 65 Iowa LR 281, n 1 (1980).

II.

A. RES JUDICATA/COLLATERAL ESTOPPEL IN CRIMINAL CASES.

The application of res judicata and collateral estoppel principles in criminal law is well established in the United States and has been applied both to the benefit of the defendant and the prosecution. When applied to the benefit of a defendant, it is primarily used to protect a defendant's double jeopardy right against further prosecution[3] or to estop the relitigation of various motions decided in the defendant's

[3]See Ashe v Swenson, 397 US 436, 443; 90 S Ct 1189; 25 LEd2d 469 (1970).

favor.[4] Similarly, when used by the prosecution against a defendant, courts have used it to preclude relitigation of pretrial evidentiary/suppression motions[5] or similar factual issues at trial,[6] as well as to preclude the relitigation of certain facts previously adjudicated that are later essential

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[4]See, e.g., People v Gray, 393 Mich 1, 4; 222 NW2d 515 (1974) a prior determination of the issue of voluntariness of a confession is "binding on the people for all purposes under the doctrine of collateral estoppel"); United States ex rel DiGiangiemo v Regan, 528 F2d 1262, 1265-1266 (CA 2, 1975) (due process requires application of collateral estoppel where the evidence was previously suppressed in a prior prosecution).

[5]See, e.g., People v Mann, 89 Mich App 511, 513-514; 280 NW2d 577 (1979); People v Scott, 93 Misc 2d 1074; 405 NYS2d 169 (1978); United States v Malizia, 429 F Supp 492, 495 (SD NY, 1977). Cf. People v Gray, n 1 supra. See also Steele v United States, 267 US 505, 507; 45 S Ct 417; 69 L Ed 761 (1925).

[6]See State v Brown, 201 SC 417, 423; 23 SE2d 381 (1942) binding on the defendant in subsequent trial); State v Sargood. 80 Vt 412, 413-414; 68 A 51 (1907) (a conviction for poisoning colts in a prior prosecution operates as conclusive proof of the act of poisoning in a subsequent prosecution).

elements in a criminal prosecution[7].

Indeed, Professor Allan D. Vestal, the leading scholar with respect to res judicata and collateral estoppel,[8] espouses its application both against the prosecution and the defendant. See

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[7]See e.g., People v Ford. 65 Cal 2d 41, 50-51, 52 Cal Rptr 228; 416 P2d 132 (1966) (a prior conviction for numerous felonies is res judicata and conclusive proof of the predicate felony for felony murder); Commonwealth v Evans, 101 Mass 25, 27 (1869) (a conviction for assault before the death of the victim precludes relitigation of any justification for the crime, i.e., self-defense, in subsequent prosecution for manslaughter of the same victim); Commonwealth v Ellis, 160 Mass 165; 35 NE 773 (1893) (a prior criminal adjudication of a subsequent prosecution under the same statute for a later offense); United States v Colacurcio, 514 F2d 1, 6 (CA 9, 1975)(see n 13 for a parenthetical example); State v Braskett, 10 Ohio Op 2d 497, 499; 162 NE2d 922 (1959) (a determination of the element of paternity decided in a prior prosecution is binding on the defendant in a subsequent prosecution). See also n 13.

[8]Professor Vestal is widely cited by courts, including the United States Supreme Court, restatements, and other scholarly articles. In a tribute to Professor vestal, Justice Ruth Bader Ginsburg pronounced him "the giant in the field" of the prior adjudication doctrine. Ginsburg, The work of professor Allan Delker Vestal, 70 Iowa L R 13, 14 (1984).

Vestal, Issue preclusion and criminal prosecutions, 65 Iowa L R 281, 312, 319-321 (1980). While conceding that use of these doctrines against a defendant does not often arise,[9] Professor Vestal contends that it is appropriately within the power of the courts[10] to apply it against a defendant, especially when the "defendant was afforded the opportunity to exercise constitutional rights at the first trial"-"the defendant has had a day in court and the fact has been adjudicated

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[9]Vestal, supra at 314, 319-320.

[10] When the state asserts issue preclusion against a criminal defendant, a discussion of double jeopardy or due process is inappropriate. Rather, the source of the state's claim of issue preclusion must be the power of the courts to control judicial administration-that is, the courts' power to administer justice. Admittedly, this has always been the ground for res judicata/ preclusion in civil cases; courts are now beginning to recognize the logic of its application in criminal cases as well. [Id. at 284].

against him."[11] Id. at 314, 312.

([10]continued)
For example,

an individual might be charged with the distribution of pornographic materials on several different days with the distribution on each day being a separate offense. Assuming that the defendant can be tried on the various separate offenses in separate trials, if there is a conviction on the first charge-assuming the incentive to litigate the matter fully-a finding that the materials were pornographic should be binding in the subsequent prosecutions if identical materials are at issue. Logic and wise use of the time of the courts, attorneys, and litigants would indicate that relitigation of the question of the nature of the material should not be allowed. [Id., at 297.]

[11]See also Vestal & Coughenour, Preclusion/ res judicata variables; Criminal prosecutions, 19 Vand L R 683, 698-699 (1966):

> Claim preclusion against a criminal defendant is usually appropriate because the defendant has had his day in court on the matter; he has had the incentive to litigate, and the issue has been determined against him. This does not deprive the defendant of anything, for preclusive effect can be given a judg- ment only after the court has made a final determination in the matter. [Id., at 699.]

Moreover, Professor Vestal is not alone in his interpretation.[12] Indeed, before the United States Constitution was ratified, English courts contemplated its use both for and against the defendant in a criminal trial. See comments, The use of collateral estoppel against the accused, 69 Colum L R 515, 523 (1969). In Rex v Duchess of Kingston, 20 Howell St Tr 355, 542 (1776), the court declared:

> [I]f the rule of evidence must be, as it is often declared to be, reciprocal, and that in all cases, in which sentences favorable to the prisoner, are to be admitted as conclusive evidence for him; the sentence, if unfavorable to the prisoner, are in like manner conclusive evidence against him....

[12]See also comments, The use of collateral estoppel against the accused, 69 Colum L R 515, 523-524 (1969).

However, unlike the instant case in which the prior proceeding was tried by a jury, the court questioned its application if the prior proceeding was tried by a judge and not a jury. Id. See also comments, supra at 523, n 63.

Subsequently, and shortly after ratification of the United States Constitution, two other English courts adhered to this view, holding that a prior decision in a condemnation proceeding was conclusive evidence against the defendant in a later criminal proceeding. King v Matthews, 5 Price 202 (1797) (Condemnation of a boat as found in a prior condemnation proceeding is "conclusive evidence of the defendant's having broken the condition of his bond"); Attorney General v Wakefield, 5 price 202, 203 (1797) ("the record of condemnation was conclusive evidence of

the seized paper being liable to duty, and that it had been sent out from the defendant's mill before the officer had taken an account of it, as was stated in the record of condemnation").

Following the lead of the English common law, the early American courts likewise applied the doctrines of collateral estoppel and res judicata against criminal defendants, even when its use precluded the relitigation of essential elements of a crime. See e.g., Commonwealth v Evans, 101 Mass 25 27 (1869); Commonwealth v Ellis, 160 Mass 165; 35 NE 773 (1893).[13]

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[13] Indeed, courts have applied these doctrines of preclusion in many different factual settings, including in alienage cases, see United States v Rangel-Perez, 179 F Supp 619 (SD Cal, 1959); Pena-Cabanilla v United States, 394 F2d 785 (CA 9, 1980); Hernandez-Uribe v United States, 515 F2d 20 (CA 8, 1975), murder trials, Carmody, n 7 supra at 85-86 ("Because of their conviction of robbery

(13 continued)
by reason of their pleas of guilty, under the doctrine of res judicata they may be precluded in the trial for murder from contending that they did not commit the robbery. Even so, no fundamental unfairness would result to petitioners in their trial for murder"), criminal tax cases, Colacurcio, n 7 supra at 6 (collateral estoppel is not just limited to status cases, i.e., whether a defendant is an alien, but applicable to a criminal tax case; the court, however, held that all the requirements for collateral estoppel were not met because the issue "was not a necessary element of the conviction in the prior case and was not 'distinctly put in issue and directly determined'"), criminal poisoning, Sargood, supra at 413-414 (see n 7 for a parenthetical example), and criminal child neglect cases, See Braskett, n 7 supra; People v Jojado, 22 Cal App 2d 323; 70 P2d 1015 (1937)(a former conviction for not supporting a minor child bars relitigation of paternity in a later prosecution); Ellis, n 7 supra.

The concurring opinion attempts to distinguish much of this precedent by noting that it only forecloses the relitigation of a defendant's status. This is a distinction without a difference. The fact remains that preclusion is being applied against a criminal defendant with respect to an essential element of a crime. While this case would inform the jury of a prior conviction rather than just a defendant's status, any fears that this would sway the jury toward a guilty verdict are allayed by a necessary limiting instruction and the unique stricture of felony murder in Michigan. See part II(B)(2).

Indeed, more recently, in a case addressing the exact issue as in the case at bar, the California Supreme Court held that in a retrial for felony murder, the prosecution could gain the benefit of prior convictions for various felonies affirmed on appeal and could use them to satisfy the predicate felony element of felony murder:

> It is obvious that the felony convictions obtained at the first trial substantially affected the prosecution and defense upon retrial of the murder charge. The burden upon the prosecution was lessened to the extent that it was permitted the benefit of the felony-murder rule without the necessity of having to prove the elements of the respective felonies. Nor was the defense permitted to dispute the fact that the necessary elements of the felonies had been conclusively found. These facts do not, however, compel the conclusion urged upon us by defendant.

> The doctrine of res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. Thus where a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried. Accordingly, it as not error for the trial court to give appropriate instructions that defendant had been convicted of the various felonies, and that if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they might predicate their verdict on the felony-murder rule articulated in Penal Code, section. 189. People v Ford, 65 Cal 2d 41, 50-51; 52 Cal Rptr 228; 416 P2d 132 (1966)(Citations omitted).

Accordingly, from a review of the case law, it is clear that a significant

number of courts and commentators have found the doctrines sound and applicable against a criminal defendant.

B. CONSTITUTIONAL IMPLICATIONS

Despite this well-established precedent applicable to criminal cases, the lead opinion contends that these decisions fail to fully afford a defendant his constitutional rights. While admitting that defendant was given his day in court for the armed robbery, the lead opinion maintains that his retrial for felony murder is a separate and distinct crime thereby making his conviction for armed robbery inapplicable as conclusive proof of the predicate felony for felony murder. In essence, the lead opinion argues that this violates a defendant's right to trial by

jury, as well as infringing on his due process rights to a presumption of innocence and proof beyond a reasonable doubt. I disagree.

1. JURY TRIAL

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.....(Emphasis added).

As explained on may occasion by the United States Supreme Court, its primary purpose was to "prevent oppression by the Government." Duncan v Louisiana, 391 US 145, 155; 88 S Ct 1444; 20 L Ed 2d 491 (1968);

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power-a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. [Id. at 156].[14]

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[14]The instant case does not question whether the jury can be impartial. If it did, a different inquiry would be required:

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial

Hence, to fulfil this purpose, the right to a jury trial is applicable in all cases "triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused." 1 Cooley, Constitutional Limitations (8th ed), pp 668-673. Against this backdrop, I review first whether the common law permitted the use of preclusion against a criminal defendant at the time the right to a jury trial was ratified.

A review of the English common law at the time of ratification indicates that at least one court contemplated the use of estoppel principles against a

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([14] continued)
formula." Frazier v United States, 335 US 497, 511; 69 S Ct 201; 93 L Ed 187 (1948), quoting United States v Wood, 299 US 123, 145-146; 57 S Ct 177; 81 L Ed 78 (1936).

defendant as long as he had a jury trial in the former prosecution. See Duchess of Kingston, and comments, supra. Moreover, shortly after ratification, two more English courts applied the doctrines of preclusion against a criminal defendant. See Matthews and Wakefield supra. Accordingly, contrary to the lead opinion's contention, it cannot be said that use of preclusion against a criminal defendant is void in constitutional history. Instead, what can be gleaned form the history of the common law is a recognition of the existence of this procedure at the time of ratification. Indeed, the lack of numerous cases on this subject is not surprising in light of the unique factual setting required for it use, e.g., retrial of one count in a multiple-count information.

Nonetheless, while use of preclusion against a defendant at common law may not be dispositive evidence that it does not violate the right to a jury trial, it is helpful in understanding the right. Indeed, when considering its use at common law in light of the general purpose behind the Sixth Amendment's right to a jury trial, it is evident that its application against a criminal defendant is generally valid and constitutionally permissible.

As applied to the instant case, I find it both realistic and rational[15] to preclude defendant from relitigating his armed robbery conviction at his retrial for felony murder. Defendant unquestionably had a constitutionally

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[15](C)ollateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.) (Ashe, n 3 supra at 444).

valid jury trial with respect to the armed robbery conviction and, on retrial for felony murder, will have a constitutionally valid jury trial. Moreover, defendant's conviction for armed robbery cannot be said to be the result of government oppression by either the judge or the prosecutor-a jury, as opposed to a judge or an overzealous prosecutor, found him guilty beyond a reasonable doubt of armed robbery.

Furthermore, while armed robbery and felony murder are separate and distinct crimes, the predicate felony used to justify a charge of felony murder in this case, i.e., armed robbery, is not separate and distinct form the felony of armed robbery, of which defendant stands convicted. Indeed, the elements were the same in defendant's first trial and will

be the same on retrial. Hence, after having this issue conclusively determined by a jury, it cannot be relitigated at defendant's felony-murder trial.

Nevertheless, by relying on case law addressing inconsistent verdicts, the lead opinion attempts to illustrate that the separateness of the crimes somehow permits the jury to consider the armed robbery conviction anew in this retrial for felony murder. People v Lewis, 415 Mich 443; 330 NW2d 16 (1982); United States v Powell, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984). However, a close review of the case law cited by the lead opinion clearly indicates that this analogy is inapposite. Neither Lewis nor Powell stand for the proposition that a felony, i.e., armed robbery, must be considered anew every time it is combined

in a compound offense such as felony murder. Instead, Lewis simply held that this Court would not review inconsistent verdicts, primarily because of possible jury lenity. Id. at 450-453. Similarly, the United States Supreme Court, under its supervisory powers over the federal courts held:

> Given...the Governments's inability to invoke review [ie., after an acquittal, double jeopardy protections prevent the government from seeking review or a new trial], the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity,...the best course to take is simply to insulate jury verdicts from review on this ground. [Powell, supra at 68-69.]

Therefore, the lead opinion's analogy is clearly not appropriate and does not support the reconsideration of the armed robbery conviction in this case.

Indeed, when following the lead opinion's analogy to its necessary conclusion, it becomes clear that its attempted application to this case would manipulate these precedents from simply a power of jury nullification to a right to render inconsistent verdicts. However, as Judge Friendly so clearly stated in United States v Kerley, 838 F2d 932, 938 (CA 7, 1988), courts have consistently held that the jury merely:

> has the power to acquit on bad grounds, because the government is not allowed to appeal form an acquittal by a jury. But jury nullification is just a power, not also a right, United States v Anderson, 716 F2d 446, 449-450 (CA 7, 1983); United States v Dougherty, [154 US App DC 76, 100] 473 F2d 1113, 1137 (1972); Devlin, the Judge 117-148 (1979)...[See Lewis, supra at 449; Powell, supra at 66.]

In essence, the lead opinion fails to recognize that we simply do not have an inconsistent verdict problem in this case

and accordingly do not have the problem of trying to explain the verdict. Instead, we have a clear and affirmative message from the jury, guilty of armed robbery. It is the use of this message that I would give conclusive effect to in defendant's retrial for felony murder.16

Moreover, I disagree that foreclosing the relitigation of the armed robbery conviction in defendant's retrial for felony murder would be the equivalent of directing a verdict of guilty against defendant, thereby interfering with the

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16Moreover, precluding the defendant from relitigating his armed robbery conviction would not preclude the jury from rendering inconsistent verdicts in this case, or, more appropriately stated and consistent with the case law, would nor not make the possible existence of inconsistent verdicts in this case reviewable by this Court. The crime of felony murder is not complete until the jury finds that the murder occurred during the commission of the armed robbery, of which

role of the jury and violating Sullivan v Louisiana, 508 US____,; 113 S Ct 2078, 2080; 124 L Ed 2d 192 (1993). Instead, I believe that the lead opinion misconstrues the clear distinction between the doctrines of preclusion and a directed verdict.

When preclusion is invoked, a court is respecting the previous jury decision and foreclosing repetitive and unnecessary litigation on the issue, i.e., once a party "has had a day in

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[16](continued) defendant already stands convicted. Indeed, because of this temporal element, it still would be appropriate to follow existing precedent and instruct the jury regarding second-degree murder as a lesser included offense of first-degree murder. See People v Aaron, 409 Mich 672, 725; 299 NW2d 304 (1980). In practice, this already occurs because the jury must first find second-degree murder and the malice attributable to the murder before deciding whether to enhance the crime to first degree murder. Id. at 721. Moreover, while not binding on this Court, the Michigan Criminal Jury Instructions already structure the instructions in such a manner as to provide the jury with this possibility.

court and the fact has been adjudicated against him," the issue is foreclosed. Vestal, supra at 312.

On the other hand, when directing a verdict, a trial judge is refusing to let any jury decide the issue, not because a previous jury has already decided the issue, but because as a matter of law no reasonable minds could disagree about the issue. In other words, a judge will grant a directed verdict when, on the evidence presented, no judgment could reasonably be rendered in favor of the nonmoving party. See Martin, Dean & Webster, Michigan Court Rules Practice (3ded), Rule 2.515 pp 228-229.

In the instant case, we are unquestionably addressing the doctrines of preclusion, not a directed verdict. Nonetheless, even if one disagreed with

this distinction, use of preclusion in this case would still be consistent with the reasoning in Sullivan:

> The right [to trial by jury] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." ...Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. [113 S Ct 2080].

In this case, a jury and not a judge has "reach[ed] the requisite finding of 'guilty'" on the armed robbery charge. Therefore, the judge would not be directing a verdict for the prosecution in violation of Sullivan. Instead, the judge would be applying the doctrines of preclusion-a distinct concept from a; directed verdict-on the basis of a previous jury decision on the merits, i.e., a conviction of armed robbery.

Further, contrary to the lead opinion's concern, precluding defendant from relitigating the elements of armed robbery will not remove significant facts from the jury's deliberative process or create a strong tendency toward a guilty verdict in violation of his right to a jury trial. Indeed, the application of statutory felony murder in Michigan refutes these concerns.

In People v Aaron, 409 Mich 672; 299 NW2d 304 (1980), this Court distinguished between felony murder as it existed at common law and Michigan's statutory felony-murder offense. There, we determined that "Michigan has no statutory felony-murder rule which allows the mental element of murder to be satisfied by proof of the intention to

commit the underlying felony."[17] Id. at 733.

The Court reasoned that the statutory crime of felony murder[18] "is merely a degree-raising device" with the commission of the underlying felony during the course of the murder raising

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[17]Although the circumstances surrounding the commission of the felony may evidence a greater intent beyond the intent to commit felony, or a wanton and wilful act in disregard of the possible consequence of death or serious injury, the intent to commit the felony, of itself, does not connote a "man-endangering-state-of-mind." Hence, we do not believe that it constitutes a sufficient mens rea to establish the crime of murder. [Id. at 728.]

[18]Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life. [MCL 750.316; MSA 28.548.]

the punishment to first-degree murder. See Aaron, supra at 719. Thus, in order to convict a defendant of felony murder, the jury must first find that he committed the murder, or in this case, aided and abetted the murder, "before the statute is applied to elevate the degree." Id. at 721. Moreover, because defendant is charged with aiding and abetting a felony murder, the jury must begin by finding that defendant had the same intent as the principal[19] by either harboring an "intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard[20] of the

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[19]People v Kelly, 423 Mich 261, 278-279; 378 NW2d 365 (1985).

[20]This element is satisfied "if the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm....: Kelly, supra at 278.

likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm....." Id. at 728-729.

With these requirements in mind, use of preclusion in this case will not remove significant facts from the jury's deliberative process so as to interfere with the rule of the jury because:

> whenever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony,...in order to establish malice the jury may consider the 'nature of the underlying felony and the circumstances surrounding its commission," People v Fountain 71 Mich App 491, 506; 248 NW2d 589 (1976). If the jury concludes that malice existed, they can find murder and, if they determine that the murder occurred in the perpetration or attempted perpetration of one of the enumerated felonies, by statute the murder will become first-degree murder. [Aaron, supra at 729-730.].

As applied in this case, the jury would not be relieved of finding malice and accordingly would not be precluded from hearing evidence of the underlying facts of the felony. Instead, the jury simply would be relieved from finding that all the elements of armed robbery are satisfied. Indeed, when reviewing both the felony-murder statute[21] and Aaron, it is clear that before finding the crime complete, a jury must make a temporal connection between the murder and the felony by finding that the murderoccurred in the course of the felony.[22] Because the jury must make a separate and distinct finding of malice, as well as finding this temporal connection between the felony and the murder, the jury would not be deprived of the crucial underlying

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[21]See n ;18.

[22]The Michigan Criminal Jury Instructions confirm this temporal element. See CJI 16:2:02.

facts of the armed robbery.[23]

Moreover, because Aaron requires that the jury first find that a murder occurred before considering the existence of the underlying felony and because the malice required for murder is a separate mens rea from the intent attributable to the armed robbery, there would not be a tendency toward a guilty verdict in violation of the right to trial by jury.

[23] Accordingly, the instant case is substantially different from Gutierrez v Superior Court, 24 Cal App 4th 153, _____; 20 Cal Rptr 2d 376, 386 (1994), relied on by the majority. There, the court expressed concern:

> whether, as a practical matter, the murder trial can be limited to the issue of causation and the jury instructed in the manner requested by the prosecution without causing prejudice to petitioner as to the issue actually to be decided by the jury in such a limited trial.

In the instant case, the structure of felony murder in Michigan does not create such a limited trial and therefore does not deprive defendant of his constitutional rights.

Certainly, if there was any sense of this tendency toward a guilty verdict, a proper limiting instruction reaffirming the jury's role, the presumption of innocence, and the use of preclusion would cure any potential problem.

Accordingly, precluding defendant from relitigating his armed robbery conviction during his retrial for felony murder would not infringe on his right to trial by jury. He had his day in court with respect to the armed robbery conviction and had his right to a jury trial and will once again have his right to a jury trial with respect to felony murder.

2. DUE PROCESS

Aside from the claim of constitutional infringement of the right

to a jury trial, both the lead and concurring opinions maintain that use of preclusion against defendant in this case would violate his due process rights to be presumed innocent and to have every element of a crime found beyond a reasonable doubt. Again, I disagree.

In Estelle v Williams, 425 US 5012, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976), the Court explained:

> The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:
>
> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v United States, 156 US 432, 453 [15 S Ct 394; 39 L Ed 381] (1895).
>
> To implement the presumption, courts must be alert to factors

> that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. In re Winship, 397 US 358, 364 [90 S Ct 1068; 25 L Ed 2d 368] (1970).

Subsequently, in Taylor v Kentucky, 436 US 478, 483; 98 S Ct 1930; 56 L Ed2d 468 (1978), the Supreme Court clarified the presumption of innocence and proof beyond a reasonable doubt by recognizing that they are interrelated concepts. In doing so, the Court explained that the general protection afforded by these concepts is the "right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion...'" Id. at 484, n 12 (quoting 9 Wigmore, Evidence [3d ed, 2511).

In the instant case, precluding

defendant from relitigating his armed robbery conviction would not infringe on these principles. Defendant was presumed innocent of the armed robbery until the prosecution effected its burden of persuasion beyond a reasonable doubt. Once the jury agreed and returned a verdict of guilty, this presumption of innocence disappeared.[24] Accordingly, it cannot be said that the use of this conviction violated defendant's due process right to be presumed innocent or that the prosecution did not meet its burden of proof beyond a reasonable doubt. Indeed, the conviction itself, along with its affirmation on appeal, forecloses these concerns.

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[24]See Herrera v Collins, 506 US_____,_____; 113 S Ct 853, 860; 122 L Ed2d 203 (1993)("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears").

Moreover, use of the armed robbery conviction on retrial for felony murder will not negate or hinder defendant's presumption of innocence, nor will it relieve the prosecution from proving felony-murder beyond a reasonable doubt.[25]

Indeed, a standard instruction regarding both the presumption of innocence and proof beyond a reasonable doubt is certainly required and would protect these important

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[25]The concurring opinion relies on Sandstrom v Montana, 442 US 510; 99 S Ct 2450; 61 L Ed2d 39 (1979), for support in finding that use of preclusion would interfere with defendant's presumption of innocence. However, Sandstrom is distinguishable for two reasons. First, the Sandstrom Court was reviewing an instruction that presumed the element of intent an intent yet to be found by any jury beyond a reasonable doubt. In the instant case, a jury has found defendant guilty of armed robbery beyond a reasonable doubt. Second, the Sandstrom jury was not given a limiting instruction as would be done in this case. Therefore, unlike Sandstrom, use of preclusion would not violate defendant's right to be presumed innocent.

rights.[26] See Taylor, supra at 485-486. However, once this is done, the defendant has received all his constitutional rights. See Taylor supra at 485-486. However, once this is done, the defendant has received all his constitutional rights.

Finally, even if not persuaded that cautionary instructions by themselves would adequately protect these important rights, the stricture of felony murder in Michigan with respect to the separate and distinct malice requirement put to rest any possible infringement of these constitutional rights. As indicated

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[26]The concurring opinion argues that the structure of felony murder would actually undermine the use of preclusion in this case because it would not further judicial economy. I disagree. Indeed, it would further judicial economy because the jury will not have to spend time considering whether the felony occurred and certainly will not have to question whether defendant was present where the felony occurred, i.e., in the house. Eliminating these considerations, as well as the time encompassed by the attorneys in argument, certainly would further judicial economy.

previously, Aaron makes clear that the jury must first find that a murder occurred before considering whether to raise the crime to first-degree murder. In doing so, the jury must find a separate and distinct mens rea apart from the intent to commit the armed robbery. Combining this finding with the intent required for aiding and abetting this murder, as well as a temporal finding that the murder occurred during the course of the felony, defendant will surely be afforded his due process rights to the presumption of innocence and proof beyond a reasonable doubt.[27]

III.

As the instant opinion indicates, collateral estoppel and res judicata have often been applied offensively against a

[27]See also text accompanying n 23.

criminal defendant. As in civil litigation, it furthers the important policy of foreclosing repetitive litigation and unnecessarily using a court's time. Indeed, it is consistent both with the expectation of the parties and the public-once a defendant received his day in court and was afforded all his constitutional rights, the litigation should cease and the defendant should have to live with the consequences. That is exactly what the doctrines of preclusion would accomplish in the instant case.

Indeed, use of preclusion against this criminal defendant clearly would not infringe on his constitutional rights to a jury trial, the presumption of innocence, or proof beyond a reasonable doubt. Defendant was afforded all these rights at his armed robbery trial and

will again be afforded all of these rights at retrial for felony murder. Further, any additional concern that this procedure still might violate these constitutional rights is put to rest by the stricture of felony murder in Michigan. Accordingly, I would reverse the decision of the Court of appeals and remand the case in accordance with the guidelines set forth herein.

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,
June 7, 1993
9:15 a.m.

v

DARRYL STEVEN GOSS,

Defendant-Appellee.

Before: Griffin, P.J., and Shepherd and Fitzgerald, JJ.

SHEPHERD, J.

After a remand by the Supreme Court for retrial on the charge of felony murder, plaintiff appeals the trial court's denial of its motion in limine that, on retrial, the jury be instructed that the element of armed robbery necessary to establish felony murder had already been proven and that it was not an issue for them to decide. We affirm.

I.

Following a prior jury trial,

defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, two counts of first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1), kidnapping, MCL 750.349; MSA 28.581, and armed robbery, MCL 750.529; MSA 28.797. People v Goss, unpublished opinion per curiam of the Court of Appeals, decided March 3, 1989 (Docket No. 99843). The Supreme Court reversed defendant's conviction for felony murder, but affirmed his convictions in all other respects. People v Goss, 437 Mich 1021 (1991).

The prosecution argues that the trial court erred in failing to grant its motion in limine because the doctrine of collateral estoppel bars relitigation of the underlying charge of armed robbery.

According to the prosecution, when this case is retried, the jury should be instructed that the defendant has been found guilty of the underlying felony, and that its responsibility is only to determine whether he is also guilty of aiding and abetting in the murder that occurred during the commission of the felony. We disagree.

II.

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. People v Gates, 434 Mich 146, 154; 452 NW2d 627, cert den ___ US ___; 110 S Ct 3238; 111 L Ed 2d 749 (1990).

Although the doctrine of collateral estoppel has been applied to criminal cases in Michigan [1] as well as in other

[1] In Gates, supra. pp 154-155, the Court noted that while collateral estoppel usually applies where there are two civil proceedings, the principle is also applicable to cases of "cross-over estoppel," which involves issue preclusion in a civil proceeding following a criminal proceeding or vice versa. In Gates, the Court found that collateral estoppel did not bar the subsequent prosecution of the defendant for second-degree criminal sexual conduct because even assuming that the issue of defendant's alleged sexual abuse of his daughter was fully proceeding, did not necessarily determine that the defendant was not guilty of the offense charged; see also involuntariness at a Walker hearing was a final factual determination binding upon the prosecution for purposes of collateral estoppel; In re Forfeiture of $1,159,420, 194 Mich App 134, 145-146; 486 NW2d 326 (1992), where a panel of the Court recently concluded in a case of "crossover estoppel" that the principle of collateral estoppel barred relitigation in a forfeiture proceeding regarding the issue of whether a federal district court had erred in determining the validity of the search warrant in the prior criminal prosecution; People v Schneider, 171 Mich App 82, 86; 429 NW2d 845 (1988), where this Court held that litigation of a second OUIL-third charge was not precluded by the doctrine of collateral estoppel; People v Davenport, 46 Mich App 579, 582, 208 NW2d 562 (1973), rev'd on other grounds 51 Mich App 484; 215 NW2d 702 (1974), where this Court stated that while the principle of collateral estoppel was not applicable to that case, the principle was applicable to civil as well as criminal cases.

jurisdictions,[2] the issue of whether the prosecution may use collateral estoppel affirmatively to establish facts relating to an essential element of an offense in a subsequent proceeding of a criminal case appears to be one of first impression.

As various courts have observed, the affirmative use of collateral estoppel by the prosecution in a criminal case does not rest upon any constitutional mandate. State v Ingenito, 87 NJ 204, 209; 432 A 2d 912, 914 (1981). The doctrine, which originated in civil litigation, has been applied in criminal cases for reasons of judicial economy and expediency. People v Plevy, 52 NY2d 58, 64; 417 NE2d 518, 521; 436 NYS2d 224 227 (1980). As the

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[2] See 9 ALR 3d 203, 9, p 241; Wharton's Criminal Law, 14th Edition, 72, pp 355-359 states:

Court of Appeals of New York stated "the doctrine, however, is not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns." Id.

A review of other jurisdictions reveals that courts are generally reluctant to support the affirmative use of collateral estoppel to establish facts relating to the essential element of an offense against a defendant in a subsequent criminal proceeding.

In United States v Rangel-Perez, 179, 625 (SD Cal, 1959), a watershed case in which a federal district court reviewed the jurisprudence of collateral estoppel in criminal cases at some length, the court observed that the majority of reported cases, both federal and state, viewed collateral estoppel as

unavailable to the prosecutor. Id. at 622-625. Nonetheless, it held that collateral estoppel was applicable to the issue of alienage where a prior conviction of illegal entry into the United States necessarily adjudicated that issue. Id. at 626-627. The court explained:

> The wise public policy underlying the doctrine, and common-sense judicial administration as well, combine to advocate application of collateral estopped against a defendant in a criminal case, at least as to certain issues, where such issues have been in fact litigated and necessarily adjudicated in a prior criminal case between the identical prosecutor and the identical accused. Issues as to status, for example, would seem most appropriate for application of the doctrine...[Id. at 625.]

In Pena-Cabanillas v United Sates, 394 F2d 785, 787 (CA 9, 1968), the Ninth Circuit adopted the holding of Rangel-Perez stating that where the issue

of a defendant's alienage was necessarily fully litigated in a criminal case, collateral estoppel may be applied to the issue in a later criminal case.

Subsequently, in United States v Colarcurcio, 514 F2d 1 (CA 9, 1975), the Ninth Circuit extended the application of collateral estoppel beyond the issue of status. In that case, the defendant was convicted of conspiring to promote illegal gambling. Facts established at that trial, concerning money received from his coconspirator's illegal operations, were judged admissible as proven in the defendant's later trial for federal income tax evasion, and the jury was so instructed. Id. at 2-3. The appellate court upheld that decision, saying:

> Appellant argues that if Rangel-Perez and Pena-Cabanillas are interpreted to mean that the

> court may instruct the jury on facts which have been directly and necessarily adjudicated in a prior trial without production of any further evidence, their holding would ignore the defendant's constitutional right to be confronted with the witnesses against him and his right to have all the facts decided by the jury. We cannot agree. With respect to all facts which were essential to a determination of the charges against appellant in the 1971 conspiracy trial, the appellant had the opportunity to cross-examine all witnesses against him and was accorded his constitutional right to trial by jury. While Rangel-Perez and Pena-Cabanillas are limited to the question of defendant's status, we conclude that the rationale of those cases is equally applicable to those facts actually decided which were essential to the judgment in the prior case. [Id., at 5-6.].

See also United States v Bejar-Matrecios, 618 F2d 81 (CA 9, 1980), another case involving alienage, which confirmed that a conviction based on a guilty plea, like a trial-based conviction, estopped a defendant from

relitigating a common material fact in subsequent proceedings. Bejar-Matrecios cited an earlier Eighth Circuit case case, again involving the issue of alienage, which came to the same conclusion: Hernandez-Uribe v United States 515 F2d 20 (CA 8, 1975), cert den 423 US 1057; 96 S Ct 791; 46 L Ed 2d 647 (1976). See also Otherson v Department of Justice, INS, 711 F2d 267 (CA DC, 1983), and Howard v INS, 930 F2d 432 (CA 5, 1991), which held that facts adjudicated in a prior criminal conviction could not be recontested in a later administrative proceedings.

However, federal courts have also opposed the use of collateral estoppel against a defendant in a subsequent criminal proceeding. In United States v Carlisi, 32 F Supp 479, 482 (ED NY, 1940), the court stated:

> [I]n transplanting the doctrine of res judicate to criminal law, the requirement of mutually had to be abandoned. A prior adjudication with respect to an element of a subsequently tried offense is not binding upon the accused. This is so, because the defendant, charged with crime, always has the right to have the jury or the jury or the trier of facts determine anew every element of guilt.

This view was more recently echoed in Bruno supra, p 576, citing United States v DeAngelo, 138 F2d 466 (CA 3, 1943):

> The application of collateral estoppel to criminal cases has been favored despite the fact that there can never be mutuality between the prosecution and the defense. An accused is always constitutionally entitled to a trial de novo, the facts alleged and in support of each offense charged against him, and collateral estoppel is available as a defense, even though it can never be raised offensively by the prosecution.

See also Bejar-Matrecios, supra at 83 n 2, where the court, in allowing the

application of collateral estoppel in a alienage case, nonetheless observed.

> Because of its potential implication for a defendant's right to confrontation and jury trial, other courts have been reluctant to decide whether the doctrine of collateral estoppel is appropriate in successive criminal proceedings. See United States v Day, 591 F.2d 861, 892 n. 23 (D.C.Cir.1979) (Robinson J., dissenting in part); United State v Cheung Kin Ping, 555 F.2d 1069, 1076 (2d Cir. 1977)

Further, state courts have generally refused to extend the doctrine when fundamental constitutional rights are implicated. In Ingenito, supra, the New Jersey Supreme Court held that collateral estoppel so used violates the right to trial by jury. As the court observed:

> Most of these cases [permitting the affirmative use of collateral estoppel by the prosecution] are limited to instances where the issue foreclosed involved status or did not go to the core of the

crime charged or where the proceeding in which estoppel was invoked did not involve a jury trial. Other cases cited ... date back almost a century or more [citing Commonwealth v Ellis, supra, at al]. To the extent that the analyses or holding of any of these cases are particularly relevant to the factual posture of this case, we do not believe they adequately or correctly treat the issue of collateral estoppel as violative of the jury right and find them to be unpersuasive authority. [Id, 87 NJ at 217; 432 A 2d at 919.]

Similarly, in Plevy, supra. the Court of Appeals of New York held that the doctrine of collateral estoppel did not bar the defendant from disputing a consent issue in a pretrial suppression hearing prior to the robbery case because the constitutional right of an accused to testify was superior to collateral estoppel. Another New York case, in deciding not to apply the doctrine against the defendant in a perjury case, observed:

The case law casts grave doubts on such full application of the doctrine of collateral estopped in criminal cases. [People v [Jacobs, 544 NYS 2d 1011, 1013; 149 AD 2d 112 (AD 3, 1989)].

Recently, in State v Johnson, 134 NH 498; 594 A 2d 1288, 1291 (1991), the Supreme Court of New Hampshire in another perjury case stated that:

> Simply stated, this Court has never collaterally estopped a criminal defendant from contesting an essential element of the charge against him or her by virtue of a prior conviction for a separate offense. Our more recent decisions indicate the inherent difficulty involved in applying a tool which originated in the civil law to the criminal setting.

But see People v Ford, 65 Cal 2d 41; 52 Cal Rptr 228; 416 F2d 132 (1966), cert den 385 US 1018; 87 S Ct 737; 17 L Ed 2d 554 (1967), where the Supreme Court of California in a felony murder case held that the doctrine of res judicata did not bar the trial court's instructions that the defendant had been convicted of various felonies and that the jury was to decide only whether the homicide was

committed during the commission of any or all of these felonies and whether the defendant possessed the requisite intent to the various felonies at the time he committed the homicide. Courts also have applied collateral estoppel against defendants on issues of suppression and probable cause, see, e.g., United States v LeVasseur, 699 F Supp 965, 980 (D Mass, 1988); Duran v Melton, 108 Mis 2d 120; 437 NYS 2d 49 (1981); People v Scott, 93 Misc 2d 1074; 405 NYS 2d 169 (1978).

III.

After reviewing other jurisdictions, we are persuaded that a defendant"s constitutional right to a trial by jury precludes the application of collateral estoppel to establish facts relating to an essential element in a subsequent criminal prosecution.

In so holding, we adopt the reasoning set forth by the Supreme Court of New Jersey in Ingentio, supra. There, the Court, after noting that the right to trial by jury is guaranteed in two separate sections of the United States Constitution, art III, 2, cl 3 and the Sixth Amendment and has been made applicable to the states through the Fourteenth Amendment, observed that "[m]any strands are interwoven to make up the composite guarantee which constitutes the right to trial by jury in a criminal case," Id. 87 NJ at 211, 432 A2d 915.

One principal strand is that the jury has the sole responsibility to decide the facts in light of the credibility of the witnesses and the weight and value of the evidence. In addition, the jury has the responsibility to find the truth and decides the

ultimate question of guilt or innocence in view of the evidence presented at trial. The Court noted that the responsibility of the jury in the dual roles as factfinder and ultimate decision-maker "is so pronounced and preeminent that we accept inconsistent verdicts that accrue to the benefit of a defendant." Id, 87 NJ at 211-212; 432 A2d at 915. Insofar as the offensive use of collateral estoppel against a defendant invades the factfinding and ultimate decisional functions of the jury, a defendant is denied his constitutional right to trial by jury.

Alongside the jury's factfinding and decision-making responsibilities is the additional requirement that a defendant be presumed innocent until proven guilty beyond a reasonable doubt. As noted in Ingenito, 87 NJ at 213; 432 A2d at 916,

the U.S. Supreme Court has stated on various occasions that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v Williams, 425 US 501, 503; 96 S Ct. 1691, 1692; 48 L Ed 2d 126, 130 (1976), reh den 426 US 954, 96 S Ct 3182, 49 L Ed 2d 1194 (1976); Taylor v Kentucky, 436 US 478, 479; 98 S Ct 1930, 1931; 56 L Ed 2d 468, 471 (1978). While the presumption of innocence is often regarded as a due process right, "Its strictures are intertwined with the substantive right of trial by jury itself." Ingenito, supra, 87 NJ at 214, 432 A2d at 917.

Accordingly, the Supreme Court of New Jersey concluded that:

[C]ollateral estoppel, applied

> affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations. Hence, the collateral estoppel doctrine, which serves to establish virtually conclusive evidence of a critical element of criminal guilt, cripples the jury in the discharge of its essential responsibilities contrary to the constitutional guarantees of the jury right in a criminal trial [Id]., 87 NJ at 216-217; 432 A2d at 918-919.]

In holding that a defendant's constitutional right to a trial by jury overrides the affirmative use of collateral estoppel to establish facts pertaining to an essential element of an offense in a subsequent criminal prosecution, we explicitly reject the use of a balancing test under the rubric of

due process in making this determination. See State v Johnson, supra, at 1292; Plevy, supra, 52 NY2d 58 at 64-66, 436 NYS 2d at 227-229, 417 NE2d at 321-523. It is inappropriate to determine the applicability of collateral estoppel on a case by case basis in terms of a balancing test weighing competing policy considerations because more is at stake than just a defendant's right to due process requiring the state to prove, beyond a reasonable doubt, every element of the charge against him. Accordingly, in the clash between the principle of collateral estoppel and the constitutional right to trial by jury, collateral estoppel must give way to permit a defendant's unfettered exercise of the constitutional right to trial by jury.

Applying this rule to the present

case, the prosecution is thus barred from introducing defendant's conviction of armed robbery to establish the underlying felony in his retrial for felony murder. Even though the instant case satisfies the requirements of collateral estoppel, [3]defendant's constitutional right to trial by jury entitles him at retrial to have the new jury decide the facts and determine his guilt or innocence regarding all the elements of felony murder. The application of collateral estoppel in this case must yield to this

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[3]In view of the five factors listed in People v Schneider, supra, p 86, the principle of collateral estoppel applies to this case: (1) the prosecutor and defendant, the parties to the robbery conviction, are the same as the parties to the robbery conviction; (2) the second cause of action for felony murder differs from the first cause of action for armed robbery; (3) the same issue is involved in the present felony murder charge because the robbery conviction obtained in the first trial is for the same robbery that is alleged as the underlying felony; (4) the underlying robbery conviction was actually litigated in the first trial; and (5) there is mutuality of estoppel.

fundamental constitutional right, even if, as the prosecution contends, proving the armed robbery element may be considered "to was valuable judicial resources in terms of time and orderliness" and even if the trial court can instruct the jury not to consider this conviction for armed Robbery as evidence that he had the requisite intent for felony murder. Because questions of judicial economy and efficiency are subordinate to the fundamental constitutional rights of a criminal defendant, we therefore reject the prosecutor's claim that collateral estoppel bars relitigation of the underlying charge of armed robbery.

Affirmed.

/s/ John H. Shepherd

/s/ E. Thomas Fitzgerald

GRIFFIN, P.M. (dissenting). This is the continuation of the case People v Goss, (Recorder's Court docket No. 86-007856). Following a jury trial in the Detroit Recorder's court, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 289.548, armed robbery, MCL 750.529; MSA 28.797, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, two counts of first degree criminal sexual conduct, MCL 750.349; MSA 28.788(2)(1), and kidnapping, MCL 750.349; MSA 28.581. On appeal, this Court, in an unpublished opinion per curiam, decided March 3, 1989 (Docket No. 99743), affirmed all of defendant's convictions. On further appeal, the Supreme Court reversed defendant's conviction of first-degree felony murder on the basis of instructional error. . A new trial was ordered for the charge of first-degree

felony murder. The Supreme Court's order states that "[i]n all other respects the judgments of the Court of Appeals and the Recorder's Court are affirmed." People v Goss, 437 Mich 1021 (1991).

After remand from the Supreme Court, the issue is whether defendant may relitigate his guilt of the underlying felony of armed robbery or whether the jury will be instructed that the underlying felony has already been proven. The Recorder's Court ruled that at retrial there could be no mention of defendant's armed robbery conviction. The court further ruled that all the elements of the crime of felony murder, including defendant's guilt of the underlying felony, must be proved anew by the prosecutor. I would apply the doctrine of res judicata and hold that

defendant is barred from relitigating his guilt of the underlying felony. Accordingly, I respectfully dissent.

I.

The doctrine of res judicata applies to criminal proceedings. People v Riley, 72 Mich App 299; 249 NW2d 397 (1976); People v Sharp, 9 Mich App 34, 39; 155 NW2d 719 (1967). "The doctrine of res judicata is to be distinguished form that of collateral estoppel." People v Schneider, 171 Mich App 82, 86; 429 NW2d 845 (1988).

The majority mischaracterizes the issue as one of collateral estoppel rather than res judicata. See generally, People v Gates, 434 Mich 146, 154 n 7;

452 NW2d 627 (1990), and People v Johnson, 191 Mich App 222, 224; 477 NW2d 426 (1991). In the present case, the bar to relitigation is not collateral to a different cause of action. Rather, the bar arises from a prior adjudication in this case.[1] For the most part, the authorities relied upon by the majority are simply not applicable to the present issue. Cf. anno: Modern status of doctrine of res judicata in criminal case, 9 ALR3d 203.

The majority concludes that defendant's constitutional rights to a jury trial and to a presumption of innocence would be violated if on retrial the jury is instructed that defendant stands convicted of the underlying

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[1]A retrial on remand is not a "new and independent case" but rather a continuation of the same cause of action. Kepner v United States, 195 US 100, 134; 24 S Ct 797; 49 L Ed 114 (1904)(Holmes, J., dissenting).

felony. I disagree. The facts are that defendant has had a trial by jury on the charge of armed robbery and has been convicted. Further, his conviction has been affirmed by this Court and the Michigan Supreme Court. Under these circumstances, "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Herrera v Collins, 506 US____; 113 S Ct 853; 122 L Ed 2d 203, 216 (1993).

II.

In People v Ford, 65 Cal 2d 41 ; 52 Cal Rptr 228; 416 P2d 132 (1966), cert den 385 US 1018 (1967), the California Supreme Court addressed the identical res judicata issue involved in this appeal. In Ford, the jury in the defendant's first trial convicted him of first-degree felony murder, burglary, robbery kidnapping, and possession of a concealed weapon. On appeal, the defendant's conviction of first-degree felony murder was reversed because of instructional error and the matter was remanded for retrial. The defendant's burglary conviction was modified while his other felony convictions were affirmed. At the retrial for felony murder, the defendant argued that it was improper for the jury to be instructed that he stood convicted of robbery, kidnapping, and possession of

a concealed weapon. The California Supreme Court disagreed:

> He further claims that the instructions were improper because they told the jury that he had been convicted of robbery, kidnapping and possession of a concealable weapon by an ex-felon, and reserved for the jury only the questions whether the homicide was perpetrated during the commission of any or all of these felonies, and whether he possessed the intent requisite to the various felonies at the time of the commission of the homicide.
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> It is obvious that the felony convictions obtained at the first trial substantially affected the prosecution and defense upon retrial of the murder charge. The burden upon the prosecution was lessened to the extent that it was permitted the benefit of the felony-murder rule without the necessity of having to prove the elements of the respective felonies. Nor was the defense permitted to dispute the fact that the necessary elements of the felonies had been conclusively found. These facts do not, however, compel the conclusion urged upon us by defendant.

The doctrine of res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offense be different. (Sealfon v United States, 332 US 575, 578; 68 S Ct 237; 92 L Ed 180 [1948]; see Teitelbaum Furs, Inc. v Dominion Ins Co, Ltd, 58 Cal 2d 601, 606; 25 Cal Rptr 559; 375 P2d 439 [1962]). Thus where a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. (See People v Beltran, 94 Cal App 2d 197, 205; 210 P2d 238 [1949], and cases cited and discussed therein.) It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried. Accordingly, it was not error for the trial court to give appropriate instructions that defendant had been convicted of the various felonies, and that if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they night predicate their

verdict on the felony-murder rule articulated in Penal Code section 189. [65 Cal 2d 50-51.]

I find Ford persuasive regarding the res judicata issue involved in the present appeal. The constitutional concerns expressed by the majority are not implicated in the context of the present case.

III.

I would reverse the denial of the people's motion in limine and remand with instructions that the jury is to be instructed that defendant stands convicted of armed robbery. The doctrine of res judicata applies and bars defendant from relitigating the armed robbery element of first-degree felony murder.